United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

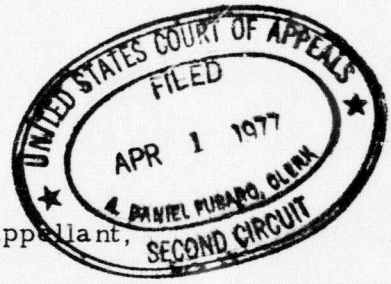
ORIGINAL WITH PROOF OR SERVICE

76-7627

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



STEVEN PAUL KESSLER,

Plaintiff-Appellant,

v.

LAWRENCE A. WIEN, et al.,

Defendants-Appellees.

B
RJ

Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

STOTSENBURG & DONOHUE, P.C.
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ATTORNEYS FOR APPELLEES (Except
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ATTORNEYS FOR APPELLEE
250 West 57th Street Associates

(6230)

COUNSEL PRESS INC. 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

PAGINATION AS IN ORIGINAL COPY

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RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

1975	
April 18	Filed complaint & issued summons
May 15	Filed amended complaint
November 12	Filed plaintiff's notice of cross-motion in opposition to defendants motion to dismiss the complaint, etc., as indicated [and for class certification]
1976	
May 20	Filed plaintiff's notice of motion for class action certification with respect to counts 3 through 7 of the complaint, returnable June 3, 1976
June 4	Filed defendants' (all except 250 West 57th Street) answer to the amended complaint
June 7	Filed defendant 250 West 57th Street's answer to the amended complaint
November 16	Filed Memorandum and Order....For the foregoing reasons, plaintiff's motion for class action certification is denied. So ordered. Owen, J.
December 10	Filed notice of appeal to United States Court of Appeals from order of November 16, 1976 by Judge Owen.
1977	
January 14	Filed letter of Steven B. Rosenfeld, Esq. dated November 11, 1975 to Honorable Richard Owen [requesting that the Court defer plaintiff's class action motion until determination of defendants' motions to dismiss]

	YR.	NUMBER	MO.	DAY	YEAR			O		J	S	OTHER	NUMBER	DEM.	YR.	NUMBER
								A-2								
208-1	75	1890	04	18	75	3	850	1		1		Injunction	0862	P	75	1890
																Owen, J.

PLAINTIFFS

KESSLER, STEVEN PAUL individually
and as a representative of a class

DEFENDANTS

WEIN, LAWRENCE A.
LANE, ALVIN S.
LINDEN, FRED
SILVERMAN, ALVIN
250 W. 57th St. ASSOCIATES
MALKIN, PETER L.
HELMSLEY, HARRY B.
SCHNEIDER, IRVING
FISK BLDG. ASSOCIATES
WEIN, LANE & MALKIN

CAUSE

Violation of Sec. Exch. Act of 1934- Disseminating false & misleading informationin prospectus to stockholders

LN

ATTORNEYS

Stotsenburg & Donohue P.C.
B. Alan Stotsenburg
~~260 Riverside Drive Xx 1002 xx 749 8868~~
122 East 42nd St., N.Y.C. 10017
986-2500

Paul Weiss Rifkind Wharton & Garrison
345 Park Ave., N.Y.C. 10022
644-8000(all Defts. except 250 West 57th)

Wien Lane & Malkin
60 East 42nd St., N.Y.C. 10017
687-8700
(250 West 57th Street Assoc.)

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.O. NUMBER	CARD	DATE MAILED
	APR 18 1975	50311		JS-5	
				JS-6	

75-1890 Kessler, Steven Paul vs Wein, Lawrence A. et al 75-1890

DATE	NR.	PROCEEDINGS Judge Owen
04-18-75	1	Filed Complaint & Issued Summons
05-06-75	2	Filed summons & return, served the following defts: Wien Lane & Malkin.....4-24-75, Lawrence A. Wien.....4-24-75, 250 W.57th St. Assoc.....4-24-75, Fisk Bldg. Assoc.....4-24-75, Harry B. Helmsley.....4-24-75, Irving Schneider.....4-24-75, Peter L. Malkin.....4-24-75, Alvin Silverman.....4-24-75, Fred Linden.....4-24-75, Alvin S. Lane.....4-24-75.
05-15-75	3	Filed AMENDED COMPLAINT .
05-19-75	4	Filed pltff's affdvt & notice of motion for a preliminary injunction-Ret. 5-23-75 -Owen, J.
05-23-75	5	Filed affdvt of personal service of memorandum of law on R. Allan Stotsenburg.
05-29-75	----	Filed Memo. end. on document #4 . Pltffs. motion for a preliminary injunction is denied in accordance with the minutes of 5/23/75. Owen J. (mailed notice)
06-02-75	6	Filed defts' affdvt in opposition to motion for a preliminary injunction.
06-02-75	7	Filed defts' memorandum of law in opposition to motion for a preliminary injunction.
06--3-75	8	Filed defts' affdvt & Order to Show Cause and Temporary restraing order to quash subpoena-Ret. 5-23-75-Owen, J.
06-03-75	9	Filed deft's affdvt in opposition to motion for a preliminary injunction.
7-15-75		*Filed Transcript of record of proceedings, dated 5-23-75*
08-11-75	10	Filed Notice of change of name of pltffs. attys.
08-20-75	11	Filed Stip & Order extending defts'. time to answer the amended complaint to 9-12-75. Defts. will not object on grounds of untimeliness to Pltff. filing motion for class action determination no later than 30 days after Defts'. answer.....Owen,J.
09-17-75	12	Filed defts Affidavit & Notice of Motion for an order dismissing the amended compl in this matter in its entirety , etc, as indicated , rtble before Owen, J. on 10-1
09-17-75	13	Filed defts memo of law in support of motion to dismiss the complaint.
10-17-75	14	Filed stip & order that the time of defts motions to dismiss etc, is extended to 10-24-75. Owen, J.
11-12-75	15	Filed Pltffs memorandum in support of motion for summary judgment , etc, as indicated .
11-12-75	16	Filed Pltffs Notice of Cross Motion in opposition to defts motions to dismiss the complaint, etc, as indicated.
12-2-75	17	Filed Reply memorandum in further suppor of defts motion to dismiss etc, as indicat
12-2-75	18	Filed Reply Affidavit of defts named in support of ~~ffs~~ motion to dismiss the compla etc, as indicated.
05-14-76	19	Filed Opinion #44412 - Defts'. motion for summary judgment is granted with respect to counts 1 and 2 and denied with respect to all other counts. Pltff's. motion for summary judgment on count 1 is denied.....Owen,J. (mailed notice)
05-20-76	20	Filed Pltff's. notice of motion for class action certification with respect to counts 3 through 7 of the complaint, ret. 6-3-76.
05-27-76	21	Filed Stip & Order extending Defts'. time to answer with respect to counts 3 - 7 of the amended complaint to 6-3-76. The class-action motion is adjourned to 6-10-76.....Owen,J.
06-04-76	22	Filed Defts'. (all except 250 West 5th St.) ANSWER to the amended complaint. PWRW&G
06-07-76	23	Filed Deft's. (250 West 57th Street) ANSWER to the amended complaint. WL&M
06-16-76	24	Filed Stip & Order adjourning Pltff's. class-cation motion to 6-24-76...Owen,J.
06-21-76	25	Filed Defts'. memorandum of law in opposition to motion for class action certification.
11-16-76	26	Filed MEMORANDUM AND ORDER ....For the foregoing reasons, pltff's motion for class action certification is denied. So ordered- OWEN,J. (m/n)

CIVIL DOCKET CONTINUATION SHEET

RO

PLAINTIFF	DEFENDANT	DOCKET NO. 75 civ 1890
KESSLER	WEIN	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
12-10-76	27	Filed notice of appeal to USCA form order of 11-16-76 by J. Owen.
1-14-77	29	Filed notice to docket clerk of transmissoin of record to USCA.

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN PAUL KESSLER,
individually and as
representative of a class,

Plaintiff,

v.

LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57th STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES and WIEN, LANE & MALKIN,

Defendants.

---

75 Civ. 1890
(Judge Owen)

AMENDED COMPLAINT

SECURITIES
CLASS ACTION

JURY TRIAL DEMANDED

Plaintiff, by his attorney, R. Alan Stotsenburg, P.C., alleges:

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action under Section 22 of the Securities Act of 1933 (the "Securities Act"), Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), and the principles of pendent jurisdiction.

2. The defendants used instrumentalities of interstate commerce, including the mails, interstate telephone networks, interstate telephone lines, interstate

telephone calls and other types of interstate transportation or communication, to carry out the common course of conduct, common plan, scheme or conspiracy (the "Conspiracy") which is the basis of this complaint.

3. Numerous acts and transactions in the Conspiracy occurred in the Southern District of New York.

PARTIES

4. Plaintiff, Steven Paul Kessler, is the holder of a $10,000 participation interest ("Interests") in 250 West 57th Street Associates.

5. Plaintiff brings this action on behalf of himself and, representatively, on behalf of the following class:

All persons who are holders of Interests in 250 West 57th Street Associates

6. Defendant Partnerships:

(a) Defendant 250 West 57th Street Associates ("Associates") is a joint venture organized and existing under the laws of the State of New York, Interests in which are held by plaintiffs and members of the class. Associates is the owner in fee of a 26-story office building located at 250

West 57th Street, New York, New York and known as the Fisk Building.

(b) Defendant Fisk Building Associates ("Fisk") is a partnership organized and existing under the laws of the State of New York. Since September 1953, the Fisk Building has been operated by Fisk under a net lease (as amended, the "Lease") from Associates.

(c) Defendant Wien, Lane & Malkin ("Law Firm") is a partnership engaged in the practice of law in the State of New York with its office at 60 East 42nd Street, New York, New York 10017. Law Firm represents

(i) Associates (and receives therefor per annum $28,000 plus 10% of the excess over $540,000 of Associates cash per annum available for distribution),

(ii) Fisk, and

(iii) the individual defendants.

7. Individual Defendants:

(a) Defendant Lawrence A. Wien is

(i) a joint venturer in defendant Associates,

(ii) a partner in defendant Fisk, and

(iii) a partner in defendant Law Firm.

(b) Defendant Alvin S. Lane is

(i) a joint venturer in defendant Associates,

(ii) a partner in defendant Fisk, and

(iii) a partner in defendant Law Firm.

(c) Defendant Fred Linden is

(i) a partner in defendant Fisk, and

(ii) a partner in defendant Law Firm.

(d) Defendant Alvin Silverman is

(i) a joint venturer in defendant Associates,

(ii) a partner in defendant Fisk, and

(iii) a partner in defendant Law Firm.

(e) Defendant Peter L. Malkin is

(i) a partner in defendant Fisk, and

(ii) a partner in defendant Law Firm.

(f) Defendant Harry B. Helmsley is a partner in defendant Fisk.

(g) Defendant Irving Schneider is a partner in defendant Fisk.

CLASS ACTION ALLEGATIONS

8. Plaintiff requests this Court to enter an order permitting this action to be maintained as a class action pursuant to Rule 23, F.R.Civ.P., based on appropriate findings under parts (1), (2) and (3) of subdivision (b) of Rule 23.

9. The prerequisites to a class action set forth in subdivision (a) of Rule 23 are met as follows:

(a) The class which plaintiff seeks to represent is so numerous that joinder of all members is impracticable. There are approximately 500 members in the proposed class. There is no manageability problem in giving notice to such class members since this is precisely what defendants did in mailing the same persons the prospectus and proxy statement which is the subject of the action.

(b) There are questions of law or fact common to the class which plaintiff seeks to represent as follows:

(i) whether the prospectus and proxy statement dated April 10, 1975 constituted an offering of a security in violation of the registration requirement of the Securities Act (Count 1);

(ii) whether such prospectus and proxy statement violated Securities Act Section 17(a) and Exchange Act Sections 10(b) and 14(a) and SEC Rules 10b-5 and 14a-9 by making false or misleading

statements of material facts, or material omissions (Counts 2 and 6);

(iii) whether such proxy statement failed to comply with the SEC proxy rules, specifically, Rules 14a-3 (Schedule 14A), 14a-4 and 14a-5 (Count 6); and

(iv) whether defendants have breached their civil and fiduciary duties to plaintiffs (counts 3, 4, 5 and 7).

This list does not exhaust the questions of law or fact which are common to the class.

(c) The claims or defenses of plaintiff are typical of the claims or defenses of the class he seeks to represent. Plaintiff does not have any special relationship with any of the defendants.

(d) Plaintiff will fairly and adequately protect the interests of the class. Plaintiff's claims are typical and representative of the claims of the class.

FACT APPLICABLE TO ALL COUNTS

10. On or about April 10, 1975, the defendants mailed to plaintiff and the class a document on the letterhead of defendant Law Firm dated April 10, 1975 (the "Prospectus" or the "Proxy Statement").

AMENDED COMPLAINT

Count 1: Violation of the Registration Provisions of the Securities Act

11. The Prospectus offers to exchange a new security for the Interests presently held by plaintiff and the class. The new security offered by the Prospectus is a "security" within the meaning of the Securities Act. The exchange is to be accomplished under guise of a revision of the terms of the Lease (the "Transaction").

12. No registration statement has been filed with the Securities and Exchange Commission ("SEC"), or is in effect, with respect to the Transaction, the Prospectus and the offer of the new securities it contains.

13. Defendants claim that the Transaction will be effected if consent of 75% of the holders of Interests is obtained and that consent, once given, is irrevocable. Defendants claim that, as of May 9, 1975, they had received a sufficient number of consents to consummate the Transaction.

14. Commissions and other rumeration will be paid by Associates to the defendants for soliciting the exchange as follows:

(a) to defendant Law Firm, directly, by payment to it of $10,000 and

(b) to the partners of Fisk, indirectly, by increasing the value of their partnership interests in Fisk.

15. The foregoing violates Section 5 of the Securities Act.

16. As a result of the aforesaid violations, plaintiff and the members of the class will sustain irreparable injury and damages, for which there is no adequate remedy at law, if the Transaction is not enjoined.

Count 2: Violation of the Anti-fraud Provisions of the Securities Act and the Exchange Act

17. The Prospectus makes untrue statements of material facts and omits to state material facts necessary to make the statements contained therein not misleading in that:

(a) the revision of the Lease is solely for the benefit of Fisk and partners of Fisk and is of no benefit to Associates or to plaintiff and the class;

(b) there is a fundamental conflict of interest in that the Law Firm representing Associates, and purportedly negotiating on their behalf, in connection with the Transaction is also representing, and controlled by, and negotiating on behalf of, defendants with interests adverse to plaintiff and the members of the class. As a result of this conflict, Law Firm breached its duties to Associates;

(c) the Prospectus fails to state that neither defendant Fisk nor any partner of Fisk intends to terminate the Lease, and the Prospectus states:

> "it [Fisk] is unwilling to continue the operation of the property. . . unless it obtains the cooperation of Associates in the form of approval of the. . . lease modification. . . ."

(d) the Prospectus implies that the mortgagee will not extend and modify the mortgage unless the Participants consent to the Transaction, whereas the mortgagee will extend and modify such mortgage whether or not the Transaction is effectuated;

(e) the Prospectus omits to state the amount of capital improvements to be made by Fisk to the building, which amount will reduce, in the year made, the rent to be received by Associates (and distributed to plaintiff and the members of the class) and the Prospectus omits to state Fisk's intent to deduct the cost of such capital improvement from the amount of such rent;

(f) the Prospectus fails to state the amount by which Fisk expects the rent payable to Associates (and distributed to plaintiff and the members of the class) to be reduced, by virtue of the Transaction, below $288,000 per year;

(g) the Prospectus fails to state that, even after the Transaction is effectuated, Fisk will be able

to terminate the Lease at any time, on 60 days notice, that it appears to them that the Lease is advantageous to Associates, plaintiff and the members of the class and disadvantageous to Fisk, or for any other reason;

(h) the Transaction will reduce the value of the interest of plaintiff and the members of the class in Associates and, at no cost to defendants (other than defendant Associates), but at the expense of plaintiff and the class, increase the value of defendants' interests; and

(i) the Transaction is on terms that are unfair to Associates, plaintiff and the members of the class and are less favorable to Associates, plaintiff and the members of the class than those which might be obtained at the time from persons who are not controlled by, controlling or under common control with defendants.

18. The foregoing proposed Transaction also operates and would operate as a fraud and deceit upon Associates, plaintiff and the class in violation of clause 3 of Rule 10b-5.

19. The foregoing violates Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and SEC Rule 10b-5.

20. As a result of these violations, plaintiff and the members of the class will sustain irreparable injury and damages, for which there is no adequate remedy at law, if the Transaction is not enjoined.

Count 3: Violation of Martin Act Filing Requirements

21. Defendants did not make the appropriate filings required by the General Business Law of the State of New York, Sections 352-e and 359-ff.

22. The foregoing violates Sections 352-e and 359-ff of the General Business Law of the State of New York.

23. As a result of these violations, plaintiff and the members of the class will sustain irreparable injury and damages, for which there is no adequate remedy at law, if the Transaction is not enjoined.

Count 4: Violation of Martin Act Anti-fraud Provisions

24. Paragraphs 17 and 18 are incorporated by reference.

25. Defendants, in effectuating the Transaction, violated the provisions of Section 352-e of the General Business Law of the State of New York.

26. As a result of these violations, plaintiff and the members of the class will sustain irreparable injury and damages, for which there is no adequate remedy at law, if the Transaction is not enjoined.

Count 5: Common Law Fraud

27. Paragraphs 17 and 18 are incorporated by reference.

28. All of these acts and practices were committed knowingly by defendants with intent to deceive plaintiff and the members of the class.

29. All of these acts and practices were in violation of the common law of fraud and misrepresentation.

30. As a result of these violations, plaintiff and the members of the class will sustain irreparable injury and damages, for which there is no adequate remedy at law, if the Transaction is not enjoined.

Count 6: Violation of the Proxy Rules

31. The Interests in Associates are registered pursuant to Section 12(g) of the Exchange Act.

32. The Proxy Statement violated the following SEC Proxy Rules:

(a) it failed to afford holders of Interest an opportunity to choose separately between approval and

disapproval of two separate and distinct matters, to wit: (x) the Transaction, and (y) a modification of the mortgage encumbering the Fisk Building (Rule 14a-4(b)(1),

(b) it falsely and incorrectly stated that the proxy is irrevocable (Rule 14a-3, Schedule 14A, Item 1),

(c) it failed to state the principal executive offices of Associates and the date on which the proxy was first mailed to holders of Interests (Rule 14a-5(e)), and

(d) it made the false and misleading statements set forth in paragraph 17 of this complaint (Rule 14a-9(b)).

33. The foregoing violates Section 14 of the Exchange Act and SEC Rules 14a-3, 14a-4, 14a-5 and 14a-9.

34. As a result of these violations, plaintiff and the members of the class will sustain irreparable injury and damages, for which there is no adequate remedy at law, if an injunction is not issued.

Count 7: Violation of Fiduciary Duty

35. Defendants Lane, Linden, Silverman, Wien and Malkin and defendant Law Firm have violated their fiduciary

duties to plaintiff and the members of the class and have used Associates for their own benefits and not for the benefits of plaintiff and the members of the class in that:

(a) Associates has paid gross and excessive fees to defendant Law Firm of which defendants Lane, Linden, Silverman, Malkin and Wien are partners; and

(b) have paid on behalf of Associates to The Seamen's Bank for Savings usurious interest rates, and have failed to act on behalf of Associates, plaintiff and the members of the class to recapture such usurious interest rates, in circumstances when such defendants knew, or through the exercise of due diligence and reasonable care ought to have known, that such interest rates were usurious and could be recaptured by Associates.

36. Defendant Law Firm has aided and abetted the other defendants in connection with the activities described in this complaint in that it has held itself out to plaintiff and the members of the class as counsel for Associates acting in Associates' interest and on Associates behalf, and it has received substantial fees therefor, when, in fact, the Law Firm has been acting by, and at the request of, the other defendants and not in the interests of Associates, plaintiff and the members of the class.

37. The foregoing conduct constituted a breach of defendants' fiduciary duties to Associates, plaintiff and the members of the class.

38. As a result of these violations, plaintiff and the members of the class have sustained injury and damages.

RELIEF REQUESTED

39. Plaintiff requests this Court to enter a declaratory judgment that the conduct alleged in Counts 1 through 7 violated the laws mentioned with respect to each Count.

40. Plaintiff requests this Court to enter an order enjoining and restraining defendants, their servants, agents and employees, preliminarily and permanently, from

(a) consummating the Transaction, or otherwise taking any steps to alter or change the relationship of the parties to the Lease;

(b) using or acting on the authority of any consents obtained, or which may in the future be received, by the use of the Proxy Statement;

(c) offering to plaintiff and any other member of the class a new security by means of a prospectus that has not been registered in compliance with the Securities Act;

(d) soliciting consents from the class to any transaction involving Associates in the absence of a proxy statement that complies with the proxy rules, including correction of false or misleading statements or material omissions in the Proxy Statement;

(e) making false or misleading statements, or omitting material facts, in any communication with the class regarding Associates; or

(f) committing further violations of the federal securities laws.

41. Plaintiff further requests this Court to enter judgment against defendants for:

(a) Damages for losses sustained as a result of defendants' acts complained of;

(b) Restitution, rescission, or rescissional damages;

(c) An award of costs, including attorneys' and accountants' fees; and

(d) Such other and further relief as may be just and proper in the premises.

Dated: May 13, 1975

R. ALAN STOTSENBURG, P.C.

By _____

260 Riverside Drive
New York, N. Y.

ATTORNEY FOR PLAINTIFF

WIEN AFFIDAVIT OF MAY 22, 1975

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

STEVEN PAUL KESSLER, individually and as representative of a class,	:	CIVIL ACTION
Plaintiff,	:	75 CIV. 1890
- v -	:	AFFIDAVIT
LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57TH STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES, and WIEN, LANE & MALKIN,	:	
Defendants.	:	

CITY AND STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LAWRENCE A. WIEN, being duly sworn, deposes and says:

1. I am a defendant in this action. I am also a co-venturer in 250 West 57th Street Associates ("Associates"), a partner in Fisk Building Associates ("FBA") and the senior partner of the law firm of Wien, Lane & Malkin ("WLM"), all of which are also Defendants.

2. This affidavit is made in opposition to the motion of Plaintiff presently before this Court, wherein he seeks an order for a preliminary injunction. I am fully familiar with all of the facts hereinafter set out, both from my own personal knowledge, and from books, records and documents of Associates, FBA and WLM .

3. By written agreement, Associates was formed as a joint venture on or about May 25, 1953. I attach hereto as Exhibit "A", a copy of that agreement which is hereafter referred to as the "Joint Venture Agreement". The Joint Venture Agreement was among myself and nine other individuals, four of whom, including myself, were also partners in the law firm of Wien, Lane, Klein & Purcell, now constituted as WLM. The Joint Venture Agreement clearly states that Associates was formed for the express purposes of: (i) acquiring the fee title to the office building located at 250-64 West 57th Street, New York, New York, commonly known (and hereafter referred to) as the Fisk Building, and (ii) leasing the Fisk Building to FBA, a partnership consisting of Harry B. Helmsley, a co-venturer in Associates, and myself.

4. From an examination of the Joint Venture Agreement, two facts are apparent, namely:

(a) It was never anticipated by the venturers of Associates that Associates would manage or operate the business of the Fisk Building; and

(b) It was clearly anticipated that Harry B. Helmsley and myself, both venturers in Associates, would be the nucleus of any group that was to operate the Fisk Building.

5. During July 1953, the venturers in Associates offered, by prospectus duly filed as part of a registration statement with the Securities and Exchange Commission, $5,000 participating units in each of the ten venturers undivided interests in Associates, or a total of 710 participating units at an aggregate offering price of $3,550,000*. The investors purchasing the units offered by each such venturer are hereinafter collectively referred to as a "Venturer's Group".

6. I attach a copy of the prospectus as Exhibit "B" ("Prospectus"). Because members of the public, including Plaintiff's father who was an original investor, purchased the participating units under and in accordance with the disclosures made by, and the terms of, the Prospectus, I wish to call the Court's

*The venturers invested a total of $50,000. Thus, there was an original capital investment by the venturers and investors of $3,600,000.

attention to the substance of its relevant statements:

(a) Associates is a joint venture made up of ten venturers, four of whom are partners in the law firm of Wien, Lane, Klein & Purcell (see "Nature of the Offering", pg. 3, and "Senior Venturers", pp. 10 and 11)*

(b) Associates was formed and organized for the sole purpose of purchasing and leasing, by net lease, the Fisk Building to FBA, a partnership consisting of Harry B. Helmsley and myself, also venturers in Associates. (see "Nature of the Offering" pg. 3, and "Formation of Associates", pp. 4 and 5);

(c) Wien, Lane, Klein & Purcell are the counsel, for both Associates, the landlord, and FBA, the tenant, under the net lease (see "Remuneration and Interest in Certain Transactions", pg. 11).

7. Accordingly, the participations in Associates were purchased by investors (hereinafter referred to as "Participants") who were fully aware that:

---

* References are to sections of the Prospectus and the pages where such sections can be found.

(a) The interest so purchased was an investment in the real property and its income, and not in the business of operating the Fisk Building;

(b) No fixed return on the Participants' investments was promised or expected;

(c) The operating lessee of the Fisk Building was to be a group in which Harry B. Helmsley and I would have a substantial interest. Thus, the Participants were not only aware of the community of interest between landlord and tenant but, in large measure, invested their money based upon the expertise of Mr. Helmsley and myself in operating commercial office buildings in the City of New York; and

(d) My law firm would represent both Associates, the landlord of, and FBA, the tenant at, the Fisk Building.

8. On or about September 30, 1953, Associates entered into an agreement of lease (which, as modified, is hereinafter referred to as the "Lease") with FBA. A copy of the Lease is attached hereto as Exhibit "C". The Lease provides, among other things:

(a) For payment of stated rents and a payment of an overage rent if the net income of FBA, before depreciation, exceeds $100,000 (¶2(B));

(b) That the tenant shall also pay, as additional rent, all taxes, water charges, assessments and all other operating and maintenance expenses of the Fisk Building, other than mortgage interest and amortization. (¶12(c));

(c) That FBA, at its sole cost and expense, shall keep in good repair and renew, rebuild and replace as necessary, the Fisk Building, including all of its equipment, fixtures and appurtenances which are used in connection with the operation thereof (¶14); and

(d) That after September 30, 1956, FBA, upon giving 60 days prior notice in the manner provided for in the Lease, may surrender the Lease at the end of any month, in which event, FBA shall have no personal liability for obligations accruing from and after the effective date of such surrender. (¶18).

9. All of the foregoing provisions of the Lease were set out and disclosed in the Prospectus (see "The Net Lease", pg. 6).

10. It must be emphasized that the transaction was structured for the benefit of the Participants because

(a) The Participants would be insulated from personal liabilities incurred in the operation of the Fisk Building; and

(b) By having FBA as the operating entity, separate and apart from Associates as the fee owner, certain tax advantages

to the Participants could be expected. I attach hereto as Exhibits "D-1" and "D-2", respectively, the tax opinions of Cravath, Swaine & Moore, and Paul, Weiss, Rifkind, Wharton & Garrison, referred to in the Prospectus (see "Tax Status", pg. 8).

11. On or about September 30, 1953, a separate participating agreement ("Participating Agreement") was signed among each of the Participants in the Venturer's Groups, and the venturer as agent for the Participants in his group. I attach hereto as Exhibit "E", a copy of the form of Participating Agreement entered into among each Venturer's Group and their agent.

12. The Participating Agreement, in substance, provides for the following rights and benefits to the Participants:

(a) Each venturer shall act as agent for the Participants in his Venturer's Group without compensation;

(b) All profits and losses arising from the ownership by Associates of the Fisk Building shall be shared by the Participants in proportion to their respective fractional interests in Associates;

(c) The Venturer, as agent for the Participants, snall not agree to sell or mortgage the Fisk Building or to

modify any existing, or make any new net lease affecting that Building, without the consent of three-fourth of the Participants in his Venturer's Group; and

(d) In the event the venturer dies, becomes incompetent or otherwise disabled, or resigns as agent, his successor shall be one of the individuals named in the Participating Agreement, or if none of those individuals can serve, a person approved by 75% of the Venturer's Group.

13. The Plaintiff's $10,000 participating interest in Associates was originally purchased by his father, Sam Kessler, who was part of the Venturer's Group with Leo Greenstein as agent. At the time such interest was purchased by Sam Kessler on or about September 30, 1953, he executed a Participating Agreement, identical in form and substance to that of Exhibit "E" attached hereto.

14. On or about July 2, 1963, Sam Kessler, by written assignment, a copy of which is attached hereto as Exhibit "F", conveyed and transferred to the Plaintiff his participating interest in Associates. By accepting such conveyance, the Plaintiff thereby agreed to assume each and every burden and obligation under the Participation Agreement and

further agreed that the transfer of the interest was made to him subject to all the terms and conditions thereof.

15. The present venturers in Associates and, thus, the agents for the Participants, are: Lawrence A. Wien, now the agent for four of the original Venturer's Groups; Alvin S. Lane, agent for two Venturer's Groups (including Plaintiff's group); Alvin Silverman, agent for three Venturer's Groups; and Fred Linden, the agent for one Venturer's Group. All are partners in WLM, and all have been approved by the Participants with knowledge of that fact.

16. Since 1953, there have been approximately seven occasions where the consent of the Participants was requested, either for the appointment of successor agents, or to modify the Lease or extend the mortgage on the Fisk Building, or for some combination of those business decisions. In each instance, I and my co-venturers solicited those consents not to favor one party to the Lease over another, but because the profits realized or losses incurred in the operation of the Fisk Building necessitated such change.

17. Moreover, the several modifications to the Lease and mortgage during those years have led to both increases and decreases in the income to the Participants. For example,

in 1958, when the mortgage was modified, distributions increased from 12% of invested capital to 13%. Those distributions were later increased to 14% as the Fisk Building increased in profitability. In 1965, when the Participants approved a Fisk Building capital improvement program, distributions were reduced again to 12%. Then, in 1969, when the Building showed substantial profit, the distributions were increased to 14%. They were again reduced to 11-1/2% when the Participants consented to a change in mortgage terms in 1970, and until now, have so remained at 11-1/2%.

18. The solicitation of the consents, which is the subject matter of this action, was necessitated by five closely related factors, namely:

(a) The depressed economy has resulted in an extremely poor office building rental market, the worst in many years;

(b) FBA lost $50,257 for the fiscal year ended September 30, 1974, and for the first six months of this current fiscal year, which will end September 30, 1975, lost almost $115,000;

(c) In part, those losses were the result of substantial tenant improvements at the Fisk Building made and paid for by FBA, which were necessary to retain

tenants whose leases were expiring and to attract new tenants to replace those that had vacated. This need for tenant improvements was (and is) continuing, and, accordingly, the need for additional funds through the refinancing of the mortgage loan on the Fisk Building became necessary;

(d) The first mortgage loan on the Fisk Building in the sum of $2,978,905, held by the Seamen's Bank for Savings, became due on May 1, 1975; and

(e) FBA had expressed its intention to terminate the Lease unless some plan could be put into effect which would allow it (i) to operate the Fisk Building without further substantial losses, and (ii) to obtain funds to defray part of the costs of tenant improvements.

19. It thus became necessary to devise a program whereby:

(a) The Lease would be modified to make FBA's obligation to pay rent more closely related to its profits and losses, thereby making a continuation of the Lease economically feasible for FBA; and

(b) The mortgage would be extended and refinanced so

as to provide for some of the funds needed for the tenant improvements.

20. Accordingly, on April 10, 1975, the consent of the Participants to the foregoing program was solicited by letter on the stationery of my law firm, a copy of which I attach hereto as Exhibit "G". In substance, that letter stated to the Participants that a modification of the Lease and extension and refinancing of the mortgage were essential to insure the continuance of the Lease, and to meet the demands of the competitive office building rental market by providing some of the funds needed to make the improvements necessary to attract and keep tenants.

21. The program submitted to the Participants by the April 10, 1975 letter provides as follows:

(a) FBA shall pay:

(i) a basic rent equal to the interest and amortization under the modified mortgage, and the fees and disbursements of my law firm;

(ii) an overage rent for distributions to the Participants, equal to the first $414,000 (11-1/2% of the original capital investment in Associates) of the net operating profit, after deduction of the basic rent, and any capital improvements made and paid for by FBA; and

(iii) a second overage rent based upon the profits over the first $414,000.

(b) FBA shall advance during the balance of its current fiscal year at the rate of $288,000 (at the rate of 8% of the original capital investment in Associates) to be distributed to the Participants.

(c) To the extent that the net operating profit (up to $414,000) for any fiscal year (or prorated portion thereof) is greater than $288,000, an additional payment of rent will be paid and an additional distribution will be made, and, thereafter, the distributions to the Participants will be increased during the succeeding year. To the extent that the net operating profit for such period is at the rate of less than $288,000, the distributions to the Participants will be at the rate of such profit during such prior year less the amount distributed in such prior year in excess of the actual profit in such prior year.

22. I have been advised by my counsel that the Plaintiff's causes of action are wholly without merit. It is clear from the foregoing facts, all of which I have documented, that the allegations of the complaint are false, misleading and without foundation. It is patent that they have been made by the Plaintiff either for the purpose of forcing a "buy-out" of

his participating unit, an opportunity not afforded to the other Participants, or to obtain some other financial benefit, or because of his ignorance. In either case, he stands only to harm his 474 co-Participants, the vast majority of whom have consented to the program and all of whom are fully and completely aware, both from previous communications and the letter of April 10, 1975, of the community of interests between Associates, FBA, WLM and the individual Defendants named in the complaint.

23. In delaying, by a preliminary injunction or otherwise, the program which has now been approved by more than 88% of the Participants*, enormous damage will result to Associates, its Participants and FBA in that:

(a) Unless the Lease modification described above, which provides for the lessee to pay as rent whatever net income the property earns, becomes effective, FBA will have no choice but to exercise its right to terminate the Lease, and, thereby, relieve itself and its partners of an unprofitable operation and future substantial liabilities. The allegation made by Plaintiff in his complaint that the partners of FBA do not intend to terminate the Lease is simply not true, and the

* Only 1.6% of the Participants have actually voted against the program

b

contrary was so indicated in my letter of April 10, 1975. It is not a matter of intention; it is a matter of necessity;

(b) As previously noted, part of the basis upon which the Participants purchased their participations in Associates was the tax benefits to be achieved as participants in a partnership for income tax purposes which was dependent upon having a net lessee at the Fisk Building. There is substantial risk that those tax benefits will be lost if FBA terminates the Lease and Associates thereby becomes taxable as a corporation.

(c) If Associates is required to operate the Fisk Building, the Participants will lose the insulation from liabilities and uninsured risks attendant upon the operation of the Fisk Building which, heretofore, and for 22 years, they have enjoyed because the Fisk Building was operated by FBA.

(d) If operating losses continue to accelerate, Associates, assuming FBA terminates the Lease, will be unable to meet the monthly mortgage installments of $26,190, the next of which is due July 1, 1975 and the quarterly real estate tax payment due July 30, 1975 in the sum of $161,766. Thus, the Participants will be subject to capital calls to meet those and other major expenses which the income from the Fisk Building cannot meet.

25. The agents for the Participants of Associates will not recommend to those Participants that a new net operating lease of the Fisk Building be entered into with a stranger with no fiduciary relationship to Associates unless the lessee thereunder either advances substantial sums for a security deposit, or agrees to some form of personal liability for the performing of lessee's obligations. However, it is my opinion that, in today's depressed economy, no responsible operator can be found who will enter into a net lease of the Fisk Building on the foregoing basis, notwithstanding the allegations of Plaintiff that a more favorable net lease is somehow readily available.

26. Finally, the Plaintiff cannot be hurt if the preliminary injunction he seeks is denied. The venturers of Associates and the partners of FBA and WLM are men of substance who can be held answerable to Plaintiff in money damages if, in fact, he has been wronged. It certainly is not necessary to jeopardize the equity of the Participants, including the Plaintiff, in Associates, where, as here, he or any other member of the class whom he purports to represent can be fully compensated by the payment of money. In that respect, the actual reduction in monthly distributions to the Plaintiff under

the proposed program is only $29.17 per month pending a final determination of the merits of Plaintiff's claims.

27. It is important for the Court to note that the distributions paid on Plaintiff's $10,000 participation unit since the inception of the investment in 1953, are approximately $28,000, not including any tax benefits to Plaintiff by virtue of his participation in Associates.

28. I have read Paragraph 17 of the Amended Complaint in this action. The facts which I have set out in this affidavit serve clearly to refute each and every one of those allegations to the extent they are coherent enough to be directly refuted. But, in addition, many are absurd on their face, such as the allegation in Paragraph 17(e) that the April 10 letter fails to state the amount of capital improvements to be made annually by FBA. Obviously, it is impossible to determine the amount to be spent on tenant improvements since FBA has no way of known which space at the Fisk Building will be rented and the extent of the improvements which will be required in connection therewith during any year. But, most importantly, I hereby deny all allegations in that Paragraph or elsewhere in the complaint which , either state or imply that I or any of my partners in FBA or WLM, or my co-venturers in Associates have breached any fiduciary or other duty to the Participants, or, in any manner, have acted improperly towards

them. I unequivocally state to this Court that I and my partners and co-ventuers have always acted in the best interests of those who have put their faith in us,,and submit that not one fact is before this Court to indicate otherwise.

27. I am, therefore, advised that, as a matter of law, Plaintiff cannot obtain a preliminary injunction. As a matter of equity, it is patently obvious that he should not.

WHEREFORE, I respectfully pray that the motion of Plaintiff for a preliminary injunction be denied in all respects and that Defendants be awarded the costs of this motion.

Lawrence A. Wien

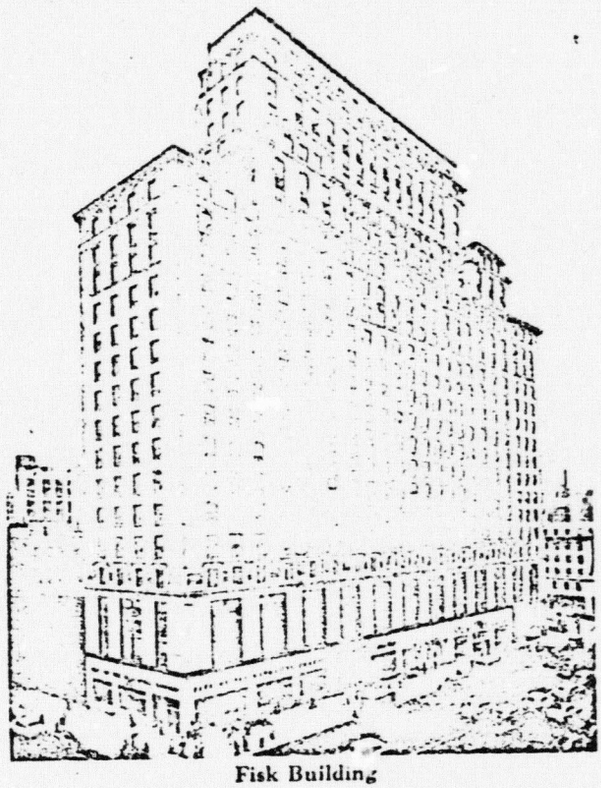
Lawrence A. Wien

Sworn to before me, the 22th
day of May, 1975.

RICHARD ABELSON
Notary Public, State of New York
No. 60-5003750 Qualified in Westchester Co.
Cert. Filed in N... Co.
Commission Expires ... 1976

EXHIBIT B TO WIEN AFFIDAVIT

PROSPECTUS



Fisk Building

710 PARTICIPATIONS

in

Joint Venturers' Undivided Interests

in

250 WEST 57th ST. ASSOCIATES*

Price $5,000.00 Per Participation

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Price to Public	Underwriting Discounts or Commissions**	Proceeds to Registrant***
Total	$3,550,000	None	$3,550,000
Per unit	5,000	None	5,000

*The members of Associates, each of whom is a Co-issuer and Co-registrant, are listed at page 3.
**As to remuneration and the interest of certain members of Associates in the transactions described herein, see page 11.
***Before deduction of the expenses of offering estimated at $63,000.

The date of this Prospectus is July 16, 1953.

EXHIBIT B TO WIEN AFFIDAVIT

No person has been authorized to give any information or to make any representations other than those contained in this Prospectus, and, if given or made, such information or representations must not be relied upon as having been authorized by 250 West 57th St. Associates or by any of the Co-Issuers.

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REGISTRATION STATEMENT

A Registration Statement has been filed with the Securities and Exchange Commission, Washington, D. C., with respect to the 710 Participations offered hereunder.

This Prospectus does not contain all of the information set forth in the Registration Statement, certain items of which are omitted or included in condensed form as permitted by the Rules and Regulations of the Commission. Statements contained herein as to the contents of any contract or other document are not necessarily complete, and in each instance reference is hereby made to the copy of such contract or other document filed as an Exhibit to the Registration Statement, each such statement being qualified in all respects by such reference.

Copies of the Registration Statement may be obtained from the Commission on payment of the prescribed charges.

EXHIBIT B TO WIEN AFFIDAVIT

250 WEST 57th ST. ASSOCIATES

NATURE OF THE OFFERING

250 West 57th St. ASSOCIATES ("Associates") is a joint venture organized by Lawrence A. Wien, Harry B. Helmsley, Irving Schneider, Bernard T. Hein, Henry W. Klein, Alvin S. Lane, William F. Purcell, Leo Greenstein, Frank N. Robinson, and J. Herbert Leder ("Senior Venturers"). Associates proposes to buy the land and building at 250-264 West 57th Street, New York City ("Fisk Building") under contracts providing for a total purchase price of $7,000,000, of which $3,500,000 is to be paid in cash and the balance by taking the premises subject to a first mortgage of $3,500,000. A deposit of $350,000 has been advanced on behalf of the Senior Venturers under the purchase contracts, and title to the property will be taken and held in their names.

Associates will not manage or operate the property. Upon the purchase, a 25-year net lease of the entire premises, renewable for a like term, will be made with Fisk Building Associates ("FBA"), a partnership comprised of Lawrence A. Wien and Harry B. Helmsley. FBA will pay $20,000 for the lease, will agree to pay a minimum annual net rent of $650,750 for the first year and $692,000 yearly thereafter, and will defray all operating and maintenance expenses, other than mortgage interest and amortization. The lease will not be cancellable for a period of three years, but can be surrendered thereafter on sixty days' notice to Associates.

Each of the ten Senior Venturers will contribute at least $5,000 to the cost of the property and, in addition, is offering by this Prospectus a maximum of 71 Participations in his interest in Associates at a unit price of $5,000. The purchaser of each Participation will own a proportionate part of the Senior Venturer's undivided interest in the property, and will share proportionately in the profits and losses arising from such ownership.

The net proceeds from the sale of Participations, after deduction of the expenses of this offering, will be used to pay the balance due under the purchase contracts, to defray costs incident to the acquisition of title, and to reimburse the Senior Venturers for a portion of deposits advanced.

Reference is made to the appropriate headings of this Prospectus for a more complete description of the foregoing matters. Information as to the rights and obligations of purchasers of Participations will be found at page 7; as to the federal income tax status of the joint ventures at page 8; as to the operating history of the building under its present ownership at page 14; and as to the estimated cash income to be received for distribution among the participants at page 9.

THE FISK BUILDING

The Fisk Building is Nos. 250-64 West 57th Street, 1767-69 Broadway and 956-62 Eighth Avenue, New York City, located on the south side blockfront of 57th Street between Broadway and Eighth Avenue. The size of the plot is approximately 22,156 sq.ft., with a frontage of 240'11½" on 57th Street, 54'3¼" on Broadway and 100'5" on Eighth Avenue. The building itself contains approximately 5,922,968 cu.ft., with a present net rentable area of approximately 354,888 sq.ft.

The building was erected in 1921, and is a 26-story, fireproof store and office building of structural steel construction, with basement. It contains 13 Otis electric elevators, 12 passenger and 1 freight.

Since 1949, in excess of $1,000,000 has been expended on improvements to the building, including modernization of entrance, corridors and halls, elevator cab conversion, conversion of heating system from coal to oil, renovation of store space and store fronts, installation of chilled water risers, 500 ton Carrier compressor and Phillips recirculating cooling tower for air conditioning purposes, construction, painting, etc.

The current assessed valuation of the premises is $5,000,000, of which $1,500,000 is allotted to the land and $3,500,000 to the building.

The ground floor and basement are occupied by a branch of a leading New York City commercial bank, a large restaurant and cafeteria, a national chain drug store and several other stores. The tenants occupying the 2nd to 26th floors are mainly insurance companies, executive and sales offices

of automobile and other manufacturing companies, domestic and foreign governmental agencies, advertising agencies, law firms and accounting firms.

On May 11, 1953, the building was fully rented. The average percentage of occupancy on a square foot basis during the past four years was:

1949-50	1950-51	1951-52	1952-53
99.82	99.32	99.96	99.70

There follows a summary of other essential rental statistics regarding the building, computed as of May 11, 1953, and information as to lease expirations is set forth in the Appendix hereto.

Gross rentable area in building		384,517 sq. ft.
Area used for public corridors	28,302 sq. ft.	
Area reserved for building use	1,327 sq. ft.	29,629 sq. ft.
Present net rentable area		354,888 sq. ft.
Vacancies		none
Total rented area		354,888 sq. ft.
*Total rent from rented area		$1,214,184.21 p.a.
**Present average rent rate — approximately	$3.421 per sq. ft. p.a.	
***Total number of rented units of space	219	
Total number of rented units under lease	156	
****Number of rented units occupied by statutory tenants	63	
Area occupied by statutory tenants (representing about 13.67% of total rented area)		48,511 sq. ft.
Rent paid by statutory tenants (representing about 12.38% of total rent)		$150,335.54 p.a.
Present average rent rate of statutory tenants — approximately	$3.099 per sq. ft.	

FORMATION OF ASSOCIATES

Associates was formed as a joint venture in the State of New York by an agreement ("Primary Agreement"), dated May 25, 1953, among the ten Senior Venturers, each of whom is a co-issuer and co-registrant hereunder. It was organized for the sole purpose of purchasing and leasing the Fisk Building.

The Senior Venturers have obtained a written assignment of the contracts for the purchase of the property, which were executed on May 11, 1953 by Lawrence A. Wien, and have assumed in writing his obligations thereunder. They are to reimburse Mr. Wien for the aggregate deposit of $350,000 which he has made under the contracts, and will each contribute $35,000 for this purpose.

The Primary Agreement provides that Associates will conclude the purchase of the Fisk Building and that title will be taken in the names of the Senior Venturers, each of whom will own a 1/10th undivided fractional interest in the property. All profits and losses arising from such ownership are to be shared equally among them. Provision also is made therein for the execution of the net lease

*Not including estimated overage for this year of approximately $50,000 from store tenants on ground floor and in basement under percentage leases, which estimate is based upon experience under these leases in the past year.

**The store tenants occupy 32,631 sq. ft. and pay a basic rental of $115,059.92 p.a., together with an estimated overage of $50,000 as described above. The present average rent rate of store tenants, not including the $50,000 overage, is approximately $3.526 per sq. ft., and including the $50,000 overage is $5.058 per sq. ft. The present average rent rate for the 2nd floor to the 26th floor is $3.411 per sq. ft.

***As distinguished from the total number of tenants—since some tenants occupy space in various parts of the building, the number of individual tenants is actually less than the number of units of space presently rented.

****The term "statutory tenants" is here used to designate those tenants who continue to occupy their premises after the expiration of their leases and only by virtue of the provisions of the New York State Emergency Commercial and Business Space Rent Control Laws.

EXHIBIT B TO WIEN AFFIDAVIT

of the entire premises to FBA. Under the Primary Agreement, the property, once acquired, cannot be sold or mortgaged, the said lease modified, or a new lease of the entire premises made, without the approval of the persons owning at least three-fourths of the property.

In the event that any Senior Venturer dies, appropriate provision is made for succession to his interest by a designee, or through the purchase of such interest by the remaining Senior Venturers if no designated successor qualifies within a six month period.

The operation of the Primary Agreement is to be supervised by Wien, Lane, Klein & Purcell, 350 Fifth Ave., New York City, who will maintain all requisite books and records. For such services they will be paid at the rate of $20,000 per year, inclusive of all regular accounting costs and disbursements (including reimbursement to the various Senior Venturers for any out-of-pocket expenses they may actually incur in connection with their duties as Agents for the participants in their interests).

By a separate Memorandum of Agreement, dated June 9, 1953, the Senior Venturers have agreed to offer Participations in their respective interests and to enter into identical joint venture agreements with the purchasers thereof, as more fully related under "Sale of Participations".

The rent received by Associates from FBA, after deducting amounts necessary for mortgage requirements and for administrative expenses as aforesaid, will be distributed monthly by the Senior Venturers among the purchasers of the Participations offered hereunder in proportion to their relative interests.

TERMS OF ACQUISITION OF THE FISK BUILDING

The Fisk Building is to be purchased by Associates pursuant to separate contracts entered into on May 11, 1953, between Lawrence A. Wien and the several present owners of various undivided fractional interests in the property. None of the present owners is affiliated with any of the Senior Venturers.

On June 9, 1953, Mr. Wien validly assigned the contracts to the Senior Venturers, who have all of the rights and obligations as purchaser thereunder.

Record title to the property now is held by nominees for the present owners. Under the purchase contracts, each of the present owners has engaged to cause title to his interest to be conveyed to the purchaser. Each contract expressly provides that unless the purchaser acquires at the closing all of the interest of all of the owners, so as to convey the entire legal and equitable title to the premises, the purchaser may terminate the contract. In such event, all deposits will be returned and the purchaser will be reimbursed for reasonable expenses of title examination. The purchaser's right is reserved, however, to elect to seek compensatory damages for any such breach or to bring an appropriate action for specific performance to the extent necessary to obtain full title, with reimbursement for reasonable attorneys' fees, if successful.

The contracts provide for an aggregate purchase price of $7,000,000 (plus or minus closing adjustments) payable as follows: $350,000 upon execution of the contracts, which sum has been advanced by Associates; $3,150,000 to be paid in cash upon delivery of the deeds; and the balance by taking the premises subject to a first mortgage thereon, in the principal amount of $3,500,000, held by The Seamen's Bank for Savings in the City of New York.

The mortgage bears interest at the rate of 4½% per annum from May 10, 1953, payable monthly beginning June 1, 1953. No payments on account of principal are required until April 1, 1954. On that date, and monthly thereafter, constant installments of $20,000 each must be paid, to be applied first to interest at the above rate and then in reduction of principal. The mortgage matures on October 4, 1964, at which time it will be necessary to refinance the then unpaid principal balance of $2,384,248.01. There is no privilege of prepayment prior to maturity.

Under the contracts, title is to be closed and the deeds delivered on September 30, 1953. However, the purchaser, by giving appropriate notice, may advance the closing date to August 31, 1953, or postpone the same until October 30, 1953. In the latter event, an additional deposit of $100,000 will be required and the cash payment due on closing will be reduced in that amount.

The contracts provide for adjustment of the purchase price on account of mortgage interest, rents, insurance premiums, taxes, fuel, service and water charges, etc. As mortgage interest is not prepaid,

any adjustment with respect thereto will result in a credit to Associates, to be used in making the next payment under the mortgage. Since all other adjustments that may be made represent operational items, FBA will pay any excess, due to such adjustments, over the cash payment otherwise required on closing. If such adjustments result in a decrease in the cash payment required, the difference will be credited to FBA and applied against the first rent payment due under the net lease.

The contracts provide that no new leases of space in the premises will be made between the contract date and the closing, nor will existing leases be changed or surrendered, without the consent of the purchaser or Harry B. Helmsley, who is one of the partners in FBA.

Expenses in the amount of $57,000 will be incurred in connection with the acquisition of title to the premises. Such expenses, which are of the type commonly incurred in such transactions, include payment for policy of title insurance, and all legal fees and disbursements relating to the preparation and execution of the various purchase contracts, supervision of the transactions and the closing of title. They will be met in large part out of the proceeds of the offering as related under "Application of Proceeds".

Certain important provisions of the purchase contracts and mortgage have been summarized above. As in the case of all other documents described in this Prospectus, their full terms are contained in Exhibits to the Registration Statement.

THE NET LEASE

The lease under which the Fisk Building is to be managed and operated will be executed between Associates and FBA upon conveyance of title to Associates. It will cover the entire premises, will provide for a term of 25 years and will be renewable by FBA for a like term upon appropriate written notice. In consideration of the value of the lease, FBA will pay $20,000 to Associates, which will be applied toward the expenses of this offering.

Under the lease, FBA will be obligated to pay a minimum annual net rent in equal monthly installments, and will be responsible for the payment of all operating and maintenance expenses of any kind (such as realty taxes, insurance premiums, etc.), other than mortgage interest and amortization. The minimum rent for the first year of the term will be $650,750 if title is acquired on August 31, 1953; $657,625 if acquired on September 30, 1953; and $664,500 if acquired on October 30, 1953. Thereafter, the stipulated rent will be $692,000 per year. In addition, if in any year FBA realizes net income in excess of $100,000 from the operation of the premises, after payment of the stipulated rent but before depreciation, it will be required to pay 50 per cent of such excess to Associates as additional rent. Yearly statements will be furnished by FBA to Associates in this connection.

Mr. Lawrence A. Wien and Mr. Harry B. Helmsley, the partners in FBA, are also Senior Venturers in Associates. Each of them has represented that his net worth is in excess of $500,000, and Associates is satisfied that they are financially responsible and capable of fulfilling the terms and obligations of the lease.

The net lease will be non-cancellable by FBA for the first three years of its term. Thereafter, FBA may surrender the lease at its option upon 60 days' written notice, without further liability after the effective date of surrender. If FBA should surrender the lease, it is anticipated that Associates will enter into a new lease on the most favorable terms available. It is to be noted that by reason of the three year non-cancellability clause, FBA is in any event firmly obligated to pay to Associates aggregate rent of not less than $2,034,750.

FBA will have the right to sublet the premises, or to assign the lease, provided the assignee assumes in writing all obligations as lessee. However, if any such assignment is made during the first three years of the lease, FBA will remain liable thereunder as lessee for all obligations accruing during such three year period.

Provision is made in the proposed lease for its termination by Associates in the event of non-payment of rent, other default or bankruptcy, insolvency, etc., of the lessee.

The proposed lease contains other provisions generally found in leases of this type, covering such matters, among other things, as the obligation of the lessee to keep the premises in good repair, to

maintain insurance policies thereon covering fire and accident, to rebuild or replace in the event of fire or other casualty (except in the last 30 months of the term), to keep the premises free from liens, and to make advance deposits for water charges, realty taxes, etc., upon demand.

SALE OF PARTICIPATIONS

Manner and Terms of Offering

The ten Senior Venturers have agreed to use their best efforts to sell the Participations covered by this Prospectus. Each of them will offer a maximum of 71 Participations in his undivided interest in Associates at a unit price of $5,000. No dealers will be employed.

The Senior Venturers will accept no money for Participations unless and until purchasers have been found for a combined total of 650 Participations so as to provide the minimum proceeds of $3,250,000 necessary to meet the final cash payment under the purchase contracts and to defray expenses incident to the acquisition of title and the issuance and distribution of the Participations (See "Application of Proceeds"). Purchasers will sign offers to purchase a specified number of Participations and, upon written acceptance by the Senior Venturer, will be bound to pay for the same in cash upon the receipt of notice, given on or before October 30, 1953, that the foregoing condition has been met; otherwise, the offers to purchase will become null and of no effect.

After the required minimum total of 650 Participations has been sold, each Senior Venturer may sell not more than six additional Participations so that he may be reimbursed for a portion of his deposit advance (See "Application of Proceeds").

Description of Participations

The rights and obligations of participants will be evidenced by identical Participating Agreements which each of the Senior Venturers will enter into upon the acquisition of title with the purchasers of portions of his interest.

Each such Participating Agreement will create a joint venture among the parties for the ownership of the particular Senior Venturer's 1/10th interest in the Fisk Building in undivided fractional parts based upon the amount that each party has contributed to the cost thereof. Each Senior Venturer will contribute $5,000 to the cost of his interest, the same being represented by a portion of the moneys advanced by way of deposit, and, in addition, may retain for himself at the public offering price, one or more of the Participations covered by this Prospectus.

The various participants will share proportionately in all profits and losses realized by the Senior Venturer from whom they purchased their Participations. Under New York law, any one participant may be liable initially to a person outside the venture for the full amount of any obligation to which his Senior Venturer may be subject by reason of record ownership. However, in such event the participant would be entitled to demand and receive pro-rata contributions from his co-participants.

Record title to a 1/10th interest will remain in the name of the Senior Venturer, who will act as "Agent" for his participants and will distribute among them each month the moneys received from Associates. The Agent may not agree to sell or mortgage the said interest, modify the net lease of the premises or enter into a new lease of the entire premises without the consent of the owners of at least three-fourths of the Participations therein. Otherwise, he may, in his capacity as Agent and subject to the terms of the Participating Agreement, bind his participants by action taken by him with respect to the said interest.

The Senior Venturer will receive no compensation for his services as Agent, but will be reimbursed for any out-of-pocket expenses incurred in that capacity. (See "Formation of Associates"). He will incur no personal liability for action taken as Agent, except for wilful misconduct or gross negligence. (This provision of the Participating Agreement will not affect any liabilities to which he might be subject under the Securities Act of 1933.) The participants will agree to indemnify him, in proportion to the amount of their Participations, against any liability arising from the fact that title to the 1/10th interest is held in his name. The Agent may resign and be discharged from further liability as such by accounting to a successor, appointed as set forth below, for all funds which have come into his possession.

Each of the joint ventures will continue until such time as the whole interest to which the particular Participating Agreement relates has been disposed of. In the event of the Agent's resignation, death or incompetency, he will be succeeded by one of three persons designated in order of priority in the Participating Agreement. If none of the designees is available, the owners of at least three-fourths of the interest may designate the new Agent. For purposes of succession, each Agent (and successor) will be required to deposit with counsel for Associates a quitclaim deed, blank as to grantee, covering the interest involved, to be held in escrow together with the original of the Participating Agreement. Upon the appointment of a successor, his name will be inserted in the deed and the escrow released.

A participant may transfer his interest, rights and obligations under the joint venture to any individual of full age, provided the transferee accepts the same in writing and a duplicate original of the instrument by which the transfer is effected is delivered to the Agent and deposited with the original copy of the Agreement.

Upon the death of a participant, any individual of full age designated in the decedent's will or by his Executor or Administrator may succeed to his interest. If no such person qualifies, the surviving parties to the joint venture may purchase such interest proportionately at a price based upon cost less any capital repaid thereon.

TAX STATUS

Associates has consulted Roswell Magill, Esq., of Cravath, Swaine & Moore, New York City, and Randolph E. Paul, Esq., of Paul, Weiss, Rifkind, Wharton & Garrison, Washington, D. C., regarding the status for Federal income tax purposes of the various joint ventures described in this Prospectus.

On June 15, 1953, Mr. Magill advised Associates that in his opinion the joint ventures created by the Primary and Participating Agreements should be treated as partnerships, and not as corporations, for Federal income tax purposes. As partnerships, the net incomes of the joint ventures would not be taxable as such, but the individual members thereof would be taxed on their distributive shares of such net incomes.

Mr. Magill further stated that there is no judicial decision nor any ruling of the Bureau of Internal Revenue which is directly in point. It is possible that the Bureau may take the position that the joint ventures should not be treated as partnerships but should be subject to tax in the same manner as a corporation. If it should ultimately be held that the joint ventures are taxable as corporations rather than as partnerships, the net incomes of the joint ventures would be taxable at the applicable Federal corporate income and excess profits tax rates, and the amounts distributed to the participants, after the deduction of such corporate taxes, would be included in their individual incomes and would be taxable at the applicable Federal individual income tax rates.

In an opinion rendered to Associates on June 24, 1953, Mr. Paul concluded that the joint venturers here involved will be taxable on a partnership basis for Federal income tax purposes. In this connection, Mr. Paul refers to various precedents developed in analogous situations which, in his view, support this conclusion. He points out the consequences that would ensue should the Bureau of Internal Revenue take a contrary position and prevail in that contention. However, he states that, in his view, the Bureau of Internal Revenue should not prevail in the courts if it attempts to assert a tax on a corporate basis.

The two opinions, in which the various pertinent factors are analyzed, have been filed as Exhibits 6(a) and 6(c) to the Registration Statement.

EXHIBIT B TO WIEN AFFIDAVIT

PROJECTED STATEMENT OF INCOME AND EXPENSES

The following schedule, which assumes that the joint ventures will be taxable as partnerships, estimates the aggregate cash income to Associates annually for a five year period and the portion thereof distributable to participants under the Participating Agreements.

(Based on acquisition of title on August 31, 1953)

	1st Year	2nd Year	3rd Year	4th Year	5th Year
RENT INCOME	$650,750.00	$692,000.00	$692,000.00	$692,000.00	$692,000.00
EXPENSES:					
Interest on Mortgage	$157,111.00	$153,864.00	$149,907.00	$145,768.00	$141,439.00
Legal and Accounting	20,000.00	20,000.00	20,000.00	20,000.00	20,000.00
	$177,111.00	$173,864.00	$169,907.00	$165,768.00	$161,439.00
Net Profit before Depreciation	$473,639.00	$518,136.00	$522,093.00	$526,232.00	$530,561.00
Depreciation (30 yr. life—3⅓% on $5,600,000.00)	186,667.00	186,667.00	186,667.00	186,667.00	186,667.00
Net Profit Allocable to Joint Venturers for Federal Income Tax Purposes	$286,972.00	$331,469.00	$335,426.00	$339,565.00	$343,894.00
PROJECTED NET RECEIPTS ON CASH BASIS					
Net Profit before Depreciation	$473,639.00	$518,136.00	$522,093.00	$526,232.00	$530,561.00
Less: Annual Amortization of Mortgage	41,639.00	86,136.00	90,093.00	94,232.00	98,561.00
*Cash Available	$432,000.00	$432,000.00	$432,000.00	$432,000.00	$432,000.00

* Representing both income and, to the extent that annual depreciation exceeds annual amortization, return of capital.

The rent income set forth above is based upon the minimum annual net rent provided for under the net lease with FBA, and assumes that such rent payments will continue after the three year period during which the lease is non-cancellable. The Statement of Operations of the present owners, appearing on Page 14 hereof cannot be used as an accurate measure of future net revenue. It would appear from that Statement of Operations that the past net revenue would not have been sufficient, during any fiscal period, to cover the minimum annual net rent provided for in the said net lease.

However, this Statement covers past operation of the property under circumstances substantially different from those which it is contemplated will obtain with respect to the operation by FBA. An analysis of the Statement of Operations of the present owners, for the year ended September 30, 1952, contrasted with the proposed operation by FBA, discloses the following:

1. The Statement shows total rental income of $1,169,912.64 for the year ended September 30, 1952, whereas the current annual rent roll as of May 11, 1953, is $1,214,184.21. In addition, based upon previous experience, it is anticipated that there will be additional income attributable to rent (based on percentage leases with store tenants) of approximately $54,500 annually.

2. The sums of $158,432.14 taken as depreciation, $139,422.69 paid as mortgage interest, $4,429.50 paid as interest on bank loans, and $5,805.38 on account of amortization of mortgage expense will not be expenses borne by FBA.

3. The Statement shows a total expenditure of $47,416.16 on account of manager's salary, office salaries, administrative expenses and supervision fees, plus $944.63 for leasing commissions. In place of these items, FBA expects to have an annual expenditure of approximately $34,000 on account of manage-

ment and leasing commissions (which includes leasing commissions payable on leases made with new tenants, where the anticipated increased rent to be obtained from such new tenants will offset the commissions payable with respect thereto).

4. The Statement discloses the payment of wages in the amount of $234,277.88, whereas FBA anticipates a payroll of approximately $220,000 per annum in the operation of the building.

5. The Statement reflects net income of $7,008.09 from the sale of electricity. FBA anticipates a net expenditure of approximately $10,000 for electricity.

6. The Statement reflects an expenditure of $160,095 for real estate taxes, whereas FBA anticipates that this expense will approximate $190,000.

7. The Statement shows the expenditure of $43,319.28 for building maintenance and repairs for the year ended September 30, 1952, which included certain extraordinary repairs of approximately $12,500 and another item of approximately $11,750 which is not of an annually-recurring nature. FBA anticipates building maintenance and repairs in the average annual amount of approximately $25,000.

A recapitulation of the foregoing figures shows that FBA anticipates an annual operating revenue which will be approximately $406,906.14 greater than that shown for the year ended September 30, 1952 in the said Statement of Operations. This anticipated difference would have resulted in a net operating revenue for that year in an amount in excess of $720,000, or more than sufficient to cover the minimum annual net rent required to be paid by FBA to Associates.

The foregoing analysis is not intended as a representation as to the actual net operating revenue of FBA in the future. It is based upon current rentals (there having been virtually 100% occupancy since 1949) and expense items which might not continue unchanged over the term of the net lease.

APPLICATION OF PROCEEDS

The maximum proceeds of the offering will be $3,550,000. As more fully set forth under "Sale of Participations", no money will be accepted hereunder unless and until offers to purchase Participations totaling at least $3,250,000 are obtained. When that sum is received, it will be used, together with the $20,000 to be paid by FBA for the net lease, to make the final cash payment required for the purchase of the Fisk Building (as described at page 5), to defray costs of $57,000 incident to the acquisition and closing of title, and to meet the expenses relating to the issuance and distribution of Participations estimated at $63,000.

To the extent that the proceeds of the offering (when added to the payment by FBA) exceed the amount required for payment of the balance of the purchase price and to defray the expenses and costs as aforesaid, such excess will be used to reimburse the Senior Venturers for that portion of the deposits advanced by them under the purchase contracts in excess of the minimum of $5,000 which each of them will contribute to the cost of his interest.

SENIOR VENTURERS

Occupation and Experience

LAWRENCE A. WIEN, Weston Road, Weston, Connecticut, is a graduate of Columbia College and Columbia Law School, and has been practicing law in the City of New York since 1928. He is the senior partner in the firm of Wien, Lane, Klein & Purcell. Over the past twenty-one years he has specialized in the field of real estate law, and in recent years has been particularly active in the purchasing of real properties in and around New York City.

HARRY B. HELMSLEY, Ridgecrest Road, Scarborough, New York, is President and a Director of Dwight-Helmsley, Inc. one of the larger real estate management and consulting firms in New York City. He is also Vice-President of Twenty-Third Street Association, Inc. and a member of American Institute of Real Estate Appraisers and National Association Institute of Property Management.

IRVING SCHNEIDER, 67-12 Yellowstone Boulevard, Forest Hills, New York, is a graduate of the College of the City of New York. He is a Vice-President and Director of Dwight-Helmsley, Inc. and has been associated with that company since 1946.

EXHIBIT B TO WIEN AFFIDAVIT

BERNARD T. HEIN, 256 Broad Avenue, Englewood, New Jersey, is a graduate of the New Jersey Law School and was admitted to the New Jersey Bar in 1930. He has practiced law in Hackensack, N. J. for the past twenty-two years, and for eight years has been a member of the firm now known as Hein, Smith & Mooney.

HENRY W. KLEIN, 67-05A 186th Lane, Flushing, New York, is a graduate of Cornell University and Harvard Law School, has been a member of the Bar of the State of New York since 1942, and is a member of the firm of Wien, Lane, Klein & Purcell.

ALVIN S. LANE, 5355 Henry Hudson Parkway, Riverdale, New York, is a graduate of the University of Wisconsin and Harvard Law School, and has been practicing law in New York City since 1947. He is a member of the firm of Wien, Lane, Klein & Purcell.

WILLIAM F. PURCELL, 5355 Henry Hudson Parkway, Riverdale, New York, is a graduate of Manhattan College and Fordham Law School, and has been practicing law in the City of New York since 1935. He is a member of the firm of Wien, Lane, Klein & Purcell.

LEO GREENSTEIN, 216 Magnolia Avenue, Mount Vernon, New York, has been practicing as a certified public accountant in New York City since 1926. For the past sixteen years he has been a member of the firm now known as Weisberg, Greenstein & Gassman.

FRANK N. ROBINSON, Silvermine Avenue, Norwalk, Connecticut, has been practicing as a certified public accountant in Connecticut since 1935. For the past eighteen years he has been a member of the firm of Robinson, Preece & Co., South Norwalk, Connecticut.

J. HERBERT LEDER, 2602 Avenue Y, Brooklyn, New York, is a graduate of New York University and the New York University Law School, and has been practicing law in New York City since 1931.

Remuneration and Interest in Certain Transactions

The Senior Venturers will not be paid for their services as Agents under the Participating Agreements.

Wien, Lane, Klein & Purcell, as counsel for Associates, will be paid $20,000 a year for administering the Primary Agreement, out of which they will pay all regular accounting costs and will reimburse the Senior Venturers for out-of-pocket expenses incurred as Agents. The firm will receive a fee of $50,000 for legal services and disbursements in connection with the acquisition of title. For their legal services in connection with the issuance and distribution of the Participations, they will receive as a fee the difference between $63,000 (which is the maximum sum allocated for offering expenses) and all other offering costs. At the present time such fee is estimated at $32,000.

Dwight-Helmsley, Inc., of which Messrs. Helmsley and Schneider are officers and directors, is named in the purchase contracts as one of the brokers who brought about the sale of the premises and who will share in the commissions to be paid therefor by the sellers of the Fisk Building.

Messrs. Wien and Helmsley are partners in FBA, which will be Associates' lessee under the net lease heretofore described at page 6. Dwight-Helmsley, Inc. will receive commissions from FBA for acting as managing agent of the premises, and the firm of Wien, Lane, Klein & Purcell will receive a monthly retainer from FBA.

PENDING LEGAL PROCEEDINGS

Associates has been advised by the sellers that there are no pending legal proceedings with respect to the Fisk Building other than ordinary routine litigation incident to the operation of the premises.

LEGALITY

The legality of the Participations offered hereunder and other matters of state law relating to the enterprises and transactions herein described have been passed upon by Wien, Lane, Klein & Purcell, Esqs., 350 Fifth Ave., New York, N. Y. Legal matters in connection with the Securities Act of 1933

have been passed upon by Milton P. Kroll, Esq., Washington Loan & Trust Building, Washington, D. C. Legal matters relating to federal tax liability have been passed upon by Cravath, Swaine & Moore (Roswell Magill, Esq.), 15 Broad Street, New York, N. Y. and Paul, Weiss, Rifkind, Wharton & Garrison (Randolph E. Paul, Esq.), 1614 Eye Street, N.W., Washington, D. C.

FINANCIAL STATEMENTS

The Statement of Operations as of April 30, 1953, listed in the Index to Financial Statements below, has been examined by George M. Sachs and Company, Independent Certified Public Accountants, as stated in their accompanying Report. The Balance Sheet of June 9, 1953, likewise so listed, has been examined by Clarke, Oakes & Greenwood, Independent Certified Public Accountants, New York, N. Y., as set forth in the accompanying Report of that firm. Such Statement and Balance Sheet are included in this Prospectus in reliance upon the opinions of said firms as experts.

250 WEST 57TH ST. ASSOCIATES

by LAWRENCE A. WIEN, Co-Issuer
HARRY B. HELMSLEY, Co-Issuer
IRVING SCHNEIDER, Co-Issuer
BERNARD T. HEIN, Co-Issuer
HENRY W. KLEIN, Co-Issuer
ALVIN S. LANE, Co-Issuer
WILLIAM F. PURCELL, Co-Issuer
LEO GREENSTEIN, Co-Issuer
FRANK N. ROBINSON, Co-Issuer
J. HERBERT LEDER, Co-Issuer

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EXHIBIT B TO WIEN AFFIDAVIT

ACCOUNTANTS' REPORT

250 West 57th St. Associates
New York, N. Y.

We have examined the Balance Sheet as at June 9, 1953 of 250 West 57th St. Associates, a joint venture registered in New York County.

In our opinion, the accompanying Balance Sheet, together with notes relating thereto, properly sets forth the financial position of 250 West 57th St. Associates as at June 9, 1953.

CLARKE, OAKES & GREENWOOD
Certified Public Accountants.

New York, N. Y.
June 12, 1953.

250 West 57th St. Associates
Balance Sheet — June 9, 1953

ASSETS

Deposit made under contracts to purchase real estate (See Notes)	$350,000.00

CAPITAL

Joint Venturers' Capital Accounts	
Lawrence A. Wien	$35,000.00
Harry B. Helmsley	35,000.00
Irving Schneider	35,000.00
Bernard T. Hein	35,000.00
Henry W. Klein	35,000.00
Alvin S. Lane	35,000.00
William F. Purcell	35,000.00
Leo Greenstein	35,000.00
Frank N. Robinson	35,000.00
J. Herbert Leder	35,000.00
	$350,000.00

The above Balance Sheet should be read in conjunction with the accompanying notes relating thereto.

Notes to Balance Sheet — June 9, 1953

Deposit made under contract to purchase real estate represents an initial deposit of $350,000.00 made by Lawrence A. Wien in behalf of himself and nine (9) associates as per schedule under caption "Capital" on the Balance Sheet herein. This deposit has been confirmed to us by the attorneys for the sellers.

The joint venture has been registered in New York County under the name "250 West 57th St. Associates." The joint venturers have undertaken to purchase the property at 250-264 West 57th Street, City, County and State of New York for the sum of $7,000,000.00. $350,000.00 is represented by the aforementioned deposit and $3,150,000.00 is to be paid upon the transfer of title in accordance with the contracts of sale. The property is being acquired subject to a first mortgage of $3,500,000.00 more fully described on page 5 of the Prospectus.

June 12, 1953.

ACCOUNTANTS' REPORT

We have examined the statement of operations of the "Fisk Building" located at 250 West 57th Street, New York, N. Y. for the period beginning February 21, 1949 and ending April 30, 1953. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

We hereby certify that in our opinion, the accompanying statement of operations presents fairly the results of operations of the "Fisk Building" for the period beginning February 21, 1949 and ending April 30, 1953, in conformity with generally accepted accounting principles applied on a consistent basis.

GEORGE M. SACHS AND COMPANY.

New York, N. Y.
June 5, 1953.

EXHIBIT B TO WIEN AFFIDAVIT

"Fisk Building"

Statement of Operations

For the Period Beginning February 21, 1949 and Ending April 30, 1953

	February 21, 1949 to September 30, 1949	Year Ended September 30, 1950	1951	1952	Seven Months Ended April 30, 1953
INCOME:					
Rentals	$681,858.28	$1,088,693.12	$1,116,056.54	$1,169,912.64	$717,979.93
Submetering Income—Electricity	—	8,151.53	8,886.94	8,351.86	—
Miscellaneous	950.77	2,677.82	5,790.36	1,364.59	9,042.83
Total Income	$682,809.05	$1,099,522.47	$1,130,733.84	$1,179,629.09	$727,022.76
DEDUCT:					
Operating Expenses:					
Wages	$121,630.61	$ 203,785.18	$ 221,983.05	$ 234,277.88	$138,716.97
Salary—Manager	7,285.71	12,722.51	13,533.94	14,500.00	10,000.00
Salaries—Office	3,445.00	6,101.00	6,954.48	7,361.32	4,581.13
Electricity (Note 1)	23,029.20	—	—	—	1,686.57
Electricity Air Conditioning	—	—	—	1,343.77	798.04
Steam and Fuel Oil (Schedule "1")	5,152.95	6,148.17	1,203.91	5,320.82	2,004.74
Water and Sewer Rental	866.28	3,236.54	5,219.40	2,074.02	931.10
Supplies	4,829.82	12,439.11	11,639.74	10,374.36	7,725.24
Service Contracts	5,174.09	7,234.14	8,485.72	9,797.76	7,647.77
Insurance	8,916.63	14,931.61	16,994.68	21,670.85	14,658.43
Administrative Expenses	6,707.06	10,734.90	8,848.93	13,805.37	9,211.73
Payroll Taxes, etc.	5,201.45	9,697.29	9,955.96	9,174.53	4,848.72
Supervision Fees	6,646.19	10,957.60	10,834.62	11,749.47	7,011.00
Commissions on Leases	227.50	111.08	892.56	944.63	3,786.96
Maintenance and Repairs:					
Building	4,536.52	17,897.32	9,425.94	43,319.28	14,499.26
Elevator	1,063.56	2,958.28	1,545.56	1,458.45	2,719.91
Painting	10,933.29	6,190.50	8,935.02	8,591.42	7,811.45
Amortization of Expenditures for Tenant Alterations	—	—	178.72	553.80	890.82
Real Estate Taxes	84,768.75	143,332.50	155,160.00	160,095.00	94,820.00
Total	$300,414.61	$ 468,477.73	$ 491,792.23	$ 556,412.73	$334,349.84
Net Operating Revenue Before Depreciation and Mortgage and Bank Interest	$382,394.44	$ 631,044.74	$ 638,941.61	$ 623,216.36	$392,672.92
Depreciation (Note 2)	$ 88,000.00	$ 141,843.52	$ 138,079.06	$ 158,432.14	$ 92,974.75
Interest on Mortgages	86,074.66	137,802.51	134,015.48	139,422.69	81,666.69
Interest on Bank Loans	—	—	3,730.71	4,429.50	513.33
Amortization of Mortgage Expense	—	5,514.69	5,514.69	5,805.38	3,386.47
Total Depreciation and Interest	$174,074.66	$ 285,160.72	$ 281,339.94	$ 308,089.71	$178,541.24
Net Operating Revenue	$208,319.78	$ 345,884.02	$ 357,601.67	$ 315,126.65	$214,131.68

See Notes on following page.

EXHIBIT B TO WIEN AFFIDAVIT

"Fisk Building"

Notes to Statement of Operations

For Period Beginning February 21, 1949 and Ending April 30, 1953

Note 1 — Electricity:

Prior to July 1, 1949 lease rentals included charge for electricity. After July 1, 1949 contract for submetering was entered into with the New York Supply and Inspection Company and rents were adjusted to exclude electricity charge. During years 1950, 1951 and 1952 there was a net income over and above electricity consumed by building for its own use. Due to change in wholesale rates for electricity, which went into effect during July 1952, the income from submetering has been diminished so that for the seven months ended April 30, 1953 there was a net cost for electricity amounting to $1,686.57.

Note 2 — Depreciation and Amortization:

The annual provision for depreciation is computed on the declining balance method using a rate of 4½%.

Expenditures for ordinary maintenance and repairs were charged against income as incurred, but expenditures in connection with improvements and rehabilitation of the property were capitalized and added to the cost of the property. The air conditioning system installed during the fiscal year ended September 30, 1952 is being depreciated at the rate of 10% on the declining balance method.

Alterations on behalf of tenants have been amortized over the terms of the respective leases.

Schedule "1"

"Fisk Building"

Net Cost of Steam and Fuel

For the Period Beginning February 21, 1949 and Ending April 30, 1953

	February 21, 1949 to September 30, 1949	Year Ended September 30, 1950	1951	1952	Seven Months Ended April 30, 1953
Steam	$9,355.81	$ 5,694.19	$ —	$ —	$ —
Fuel Oil	—	7,765.42	10,701.44	15,124.83	10,815.64
Total	$9,355.81	$13,459.61	$10,701.44	$15,124.83	$10,815.64
Deduct:					
Boiler Rental	$2,113.71	$ 3,314.52	$ —	$ —	$ —
Hot Water Charges	2,089.15	3,996.92	102.53	101.51	67.40
Overtime Heating Charges	—	—	9,395.00	9,702.50	8,743.50
Total Deductions	$4,202.86	$ 7,311.44	$ 9,497.53	$ 9,804.01	$ 8,810.90
Net Cost of Steam and Fuel	$5,152.95	$ 6,148.17	$ 1,203.91	$ 5,320.82	$ 2,004.74

EXHIBIT B TO WIEN AFFIDAVIT

APPENDIX

Fisk Building
New York, N. Y.

LEASE EXPIRATIONS

Year	Number of leases expiring	% of total no. of leases	Gross rent	% of total rent from rented area*
**month to month	9	5.77	$ 7,989.96	0.66
1953	32	20.51	142,056.85	11.70
1954	68	43.59	436,006.36	35.91
1955	26	16.67	156,997.48	12.93
1956	9	5.77	47,657.00	3.93
1957	2	1.28	90,003.02	7.41
1958	1	0.64	10,892.50	0.90
1959	1	0.64	34,983.00	2.89
1961	1	0.64	19,552.50	1.61
1963	5	3.21	73,450.00	6.05
1964	1	0.64	4,260.00	0.35
1972	1	0.64	40,000.00	3.29
	156		$1,063,848.97	

*The percentage figures do not total 100%. This results from the fact that the dollar amounts were not compared with the total rent from units under lease, but rather with the total rent from all units, including units subject to statutory tenancies.

**This category represents month to month leases in which both landlord and tenant have the option to cancel on 30 days notice. The total area rented thereunder contains 2,288 sq. ft., which is about 0.64% of the total rented area in the building.

EXHIBIT C TO WIEN AFFIDAVIT

AGREEMENT OF LEASE made the 30th day of September, 1953, between 250 WEST 57TH ST. ASSOCIATES, a joint venture having its office at 350 Fifth Avenue, New York 1, New York (hereinafter called the "Landlord"), and FISK BUILDING ASSOCIATES, a partnership having its office at 350 Fifth Avenue, New York 1, New York (hereinafter called the "Tenant").

W I T N E S S E T H:

1. The Landlord hereby leases to the Tenant the following premises:

ALL THAT CERTAIN lot, piece or parcel of land with the building and improvements thereon erected, situate, lying and being in the Borough of Manhattan, County of New York, City and State of New York, bounded and described as follows:

BEGINNING at the corner formed by the intersection of the southerly side of 57th Street with the Westerly side of Broadway; running thence southerly along said Westerly side of Broadway 54 feet 3-1/4 inches; thence westerly parallel with said southerly side of 57th Street 71 feet 1/2 inches; thence southerly parallel with the easterly side of 8th Avenue 50 feet to the centre line of the block; thence Westerly again parallel with the said Southerly side of 57th Street and along the centre line of the block 190 feet to said easterly side of 8th Avenue; thence northerly along said Easterly side of 8th Avenue 100 feet 5 inches to the corner formed by the intersection of said Easterly side of 8th Avenue with said Southerly side of 57th Street; thence Easterly along said Southerly side of 57th Street 240 feet 11-1/2 inches to the point or place of beginning.

SAID PREMISES being known as and by the street numbers 1767-1769 Broadway, 250-254 West 57th Street and 956-962 Eighth Avenue.

TOGETHER with all the right, title and interest of the Landlord of, in and to any streets and roads in front of and adjoining said premises to the centre lines thereof.

TOGETHER with all personal property and fixtures appurtenant to or used in the operation of said premises, including, but not limited to,

plumbing fixtures, heating plant and fixtures and air-conditioning plant, equipment, ducts and machinery.

for a term of twenty-five (25) years, commencing at 12:01 A.M. on the 1st day of October, 1953, and ending at 12:00 midnight on the 30th day of September, 1978, upon the terms and conditions hereinafter set forth.

2. (A) The Tenant covenants to pay rent, in equal monthly installments, in advance, on the first day of each month during said term, as follows:

From October 1, 1953, to February 28, 1954, the sum of Two Hundred Fifty-three Thousand Nine Hundred Fifty-eight and 33/100 Dollars ($253,958.33), in equal monthly payments of Fifty Thousand Seven Hundred Ninety-One and 67/100 Dollars ($50,791.67);

From March 1, 1954, to September 30, 1978, the sum of Six Hundred Ninety-Two Thousand Dollars ($692,000) per annum, in equal monthly payments of Fifty-Seven Thousand Six Hundred Sixty-Six and 67/100 Dollars ($57,666.67).

(B) The Tenant shall keep its records on a fiscal year basis, commencing with October 1, 1953. Within sixty (60) days after the end of each fiscal year, the Tenant shall deliver to the Landlord a written statement of the operation of the demised premises during the preceding fiscal year. If such statement shall disclose a net income after the payment of rent and all other expenses, but before depreciation, in excess of One Hundred Thousand Dollars ($100,000), fifty per cent (50%) of the excess over One Hundred Thousand Dollars ($100,000) shall be paid as additional rent at the time of the delivery of the statement.

(C) The Tenant shall also pay, as additional rent, all realty taxes, water charges and assessments affect-

ing the demised premises, as well as all other operating and maintenance expenses of the property other than mortgage interest and amortization. The Tenant shall have the right, at its sole expense, to contest or review any realty taxes, water charges or assessments by appropriate legal proceedings. It is the intention of the parties that this is a net lease, and that the Landlord shall receive the stipulated rental free from all taxes, charges or expenses of any kind.

(D) The Tenant shall deposit with the Landlord or any designee of the Landlord, upon demand, such sums by way of advances against realty taxes, water charges, assessments and insurance premiums as the Landlord may reasonably require from time to time. If the Tenant shall make any such deposits with the Landlord, the Landlord agrees to use the sums so deposited for the payment of realty taxes, water charges, assessments or insurance premiums, as the case may be, as such charges become due and payable.

3. The Tenant may renew this lease for an additional period of twenty-five (25) years at the annual rental of Six Hundred Ninety-Two Thousand Dollars ($692,000) payable in equal monthly payments of Fifty-Seven Thousand Six Hundred Sixty-Six and 67/100 Dollars ($57,666.67), upon the same terms and conditions (excepting the clause relative to renewal), provided that the Tenant is not in default hereunder, and provided further that the Tenant gives to the Landlord at least ninety (90) days' written notice of renewal.

4. The Tenant, at its sole cost and expense, shall keep in good repair and shall renew, rebuild and replace, as necessary, the building located on the demised premises, the sidewalks adjacent thereto, and all equipment, fixtures and appurtenances used in or about the building. At the end of the lease, the Tenant will surrender the building, sidewalks,

equipment, fixtures and appurtenances in good condition and repair, with due allowance for reasonable wear and tear.

5. The Tenant, at its sole cost and expense, shall comply with all orders, regulations and requirements of all governmental authorities, the New York Board of Fire Underwriters and the New York Fire Insurance Exchange as they affect the use and operation of the demised premises. The Tenant may contest or review any order, regulation or requirement, by legal proceedings or otherwise, before compliance therewith.

6. The Tenant, at its sole cost and expense, shall furnish and keep in force during the term of this lease, fire insurance to the extent required under any appropriate appraisal. The policies shall provide for payment to the Landlord and to any mortgagee whom the Landlord may designate. All policies shall remain in the possession of the Landlord or the Landlord's mortgagee. The Tenant shall pay the premiums as they accrue. The Tenant covenants that it will not do or suffer to be done any act upon the demised premises which will invalidate the fire insurance policies covering same.

7. The Tenant, at its sole cost and expense, shall furnish and keep in force during the term of this lease, liability insurance against accidents, with amounts of Three Hundred Thousand Dollars ($300,000) for a single claim, and One Million Dollars ($1,000,000) for more than one claim, which liability insurance shall be carried so as to cover the Landlord as well as the Tenant.

8. After September 30, 1956, the Tenant, upon giving sixty (60) days' prior notice as provided in Paragraph "26" hereof, may surrender this lease at the end of any month, in

which event the Tenant shall have no personal liability for obligations accruing after the effective date of such surrender.

9. The Tenant may assign this lease, or sublet the premises, or any portion thereof, without the Landlord's consent. No assignment, however, shall be valid unless the assignee shall assume in writing all the obligations of the Tenant hereunder. In the event that the within lease is terminated for any reason, the Landlord agrees to accept as its tenants any sublessees under subleases made by the Tenant, provided as to each sublessee that he is not in default under the terms of his sublease, and that he attorns to the Landlord.

10. If the Tenant abandons the demised premises or is evicted therefrom, without having given sixty (60) days' notice of termination as provided in Paragraph "8" above, such abandonment or eviction shall be treated as the said sixty (60) days' notice, and the liability of the Tenant shall continue for a period of sixty (60) days from the end of the month in which the abandonment or eviction occurs.

11. In the event of a surrender of this lease pursuant to Paragraph "8" hereof, or in the event of a valid assignment of this lease pursuant to Paragraph "9" hereof, or in the event of an abandonment by or eviction of the Tenant so as to create a surrender pursuant to Paragraph "10" hereof, then, in any of such events, the only obligations for which the Tenant shall continue to be liable after the effective date of such surrender or assignment shall be the payment of accrued rent and the payment of a proportionate share of the real estate taxes on the demised premises, of the insurance premiums, and of all other charges for which the Tenant is

responsible under the terms hereof, to the effective date of such surrender or assignment or September 30, 1956, whichever is later.

Similarly, if any party to the partnership which constitutes the Tenant herein makes a valid assignment of his interest in such partnership, and if the assignee thereof assumes in writing all of the obligations of such assignor hereunder, then such assignor shall be relieved of all personal liability under this lease except for accrued rent and a proportionate share of real estate taxes and other charges as hereinabove provided. Such release of liability, however, shall under no circumstances be effective prior to September 30, 1956.

12. The Tenant shall keep the demised premises free of mechanics' liens or other liens or orders for the payment of money. The Tenant shall defend all suits to enforce such liens or orders, whether against the Landlord or the Tenant, at the Tenant's sole expense. The Tenant hereby indemnifies the Landlord against any expense or damage as a result of such liens or orders.

13. The Tenant agrees that its rights hereunder are subordinate to any mortgages now on the demised premises, or which hereafter may be placed thereon, provided that the aggregate annual payment for interest and amortization on any such mortgages shall not exceed Six Hundred Ninety-Two Thousand Dollars ($692,000). The Tenant agrees to execute, upon demand, any documents required to evidence such subordination. The Tenant further agrees that it will not do or suffer to be done any act upon the demised premises which will violate any of the terms of any such mortgages or the obligations secured thereby.

EXHIBIT C TO WIEN AFFIDAVIT

14. If the Landlord shall default under the terms of any mortgage to which this lease is subject, the Tenant may pay to the mortgagee the sum necessary to cure the default. The Tenant shall have the right to offset such payment, with interest thereon, against any rent accruing hereunder until such payment and interest shall have been repaid to the Tenant in full.

15. The Landlord may terminate this lease by giving five (5) days' notice as provided in Paragraph "26" hereof:

(A) If rent or any other payment due from the Tenant shall be unpaid for five (5) days after notice by the Landlord; or

(B) If the Tenant shall be in default in the performance of any other agreement herein and such default is not cured within thirty (30) days after notice given by the Landlord; or

(C) If the Tenant shall be adjudicated a bankrupt, make a general assignment for the benefit of creditors, or take the benefit of any insolvency act, or if a permanent receiver or trustee in bankruptcy be appointed for the Tenant's property and such appointment is not vacated within ninety (90) days.

In the event that the Landlord shall give the five (5) days' notice of termination as hereinabove provided, this lease shall automatically terminate at the end of the said five (5) day period, and it shall be lawful for the Landlord at its option to re-enter the demised premises by summary proceedings or by any action or proceeding or by force or otherwise, and to have, hold, repossess and enjoy them. The Tenant hereby waives any right to redeem the demised premises and any right to notice of re-entry.

16. The Landlord or its representatives shall have

the right to enter the demised premises at all reasonable hours, to examine the premises, or to make any repairs necessary for the safety and preservation thereof.

17. The Landlord or its representatives may show the premises, during reasonable business hours, to prospective purchasers. During the six (6) months preceding the expiration of the term hereof, the Landlord or its agents may place notices on any portion of the building, offering the premises "To Let" or "For Sale".

18. The Landlord hereby assigns to the Tenant all of the Landlord's right, title and interest in existing leases and tenancies, if any, in the demised premises, and in the rents becoming due and payable under the terms of existing leases and tenancies.

19. If the Tenant shall vacate or be evicted from the demised premises, and shall fail to remove any trade fixtures or other property, the said fixtures and property shall be deemed abandoned by the Tenant, and shall become the property of the Landlord.

20. The Tenant may make alterations, additions and improvements to the demised premises, without the written consent of the Landlord. However, the prior written consent of the Landlord shall be required if:

a) A substantial portion of the building on the demised premises is to be demolished;

or

b) Any single alteration, addition or improvement shall cost more than One Hundred Thousand Dollars ($100,000).

The Landlord agrees that it will not withhold its consent

unreasonably. Before any alterations, additions or improvements are begun, plans and specifications therefor must be exhibited to and approved by the Landlord.

21. If, by reason of any default by the Tenant under the terms of this lease, the Landlord shall pay any sum of money or do any act which shall require the expenditure of any sum of money, the Tenant shall repay such sums to the Landlord upon demand. The Landlord may charge such sums, together with interest thereon, as additional rent, to be due upon the next rent day. This provision shall not be construed to postpone the Landlord's right to collect such sumsby action or otherwise.

22. If the demised premises be condemned during the term of this lease by any competent authority, for any public or quasi-public use, the lease shall end as of the date of the vesting of title under such condemnation. The Landlord and the Tenant shall participate in the condemnation award as follows:

A. In the event of total condemnation:

1. The Landlord shall first retain the sum of Seven Million One Hundred Thousand Dollars ($7,100,000).

2. The balance shall be divided equally between the Landlord and the Tenant.

B. In the event of partial condemnation, the parties shall agree upon the percentage of property taken. If agreement cannot be reached by the parties, the question shall be determined by arbitration through the American Arbitration Association, under its rules then in effect. The rental shall be reduced in proportion to the percentage of the property taken by condemnation. The cash proceeds

of the partial condemnation shall be distributed as follows:

1. The cost of repairs to the building, as a result of the partial condemnation, shall first be paid.

2. There shall next be paid to the Landlord an amount equal to the percentage of Seven Million One Hundred Thousand Dollars ($7,100,000) which the value of the condemned portion of the property bears to the total value of the property before condemnation.

3. The balance shall be divided equally between the Landlord and the Tenant.

23. (A) If any building erected upon the demised premises shall be damaged or destroyed by fire or other casualty, the Tenant shall promptly repair or rebuild the same at Tenant's expense, so as to make said building at least equal in value to the building existing immediately prior to such occurrence. The Landlord shall permit the net proceeds of any insurance to be applied to the payment of the cost of such repairing or rebuilding as the same progresses. If the insurance proceeds shall exceed the cost of such repairs or rebuilding, the excess shall belong to the Tenant. The plans and specifications for any new or reconstructed building, or for any repairs involving material alterations, shall be approved in writing by the Landlord, whose approval shall not be unreasonably withheld. There shall be no abatement of rent during the repairs or reconstruction.

(B) In the event that the holder of any mortgage on the demised premises shall elect to apply the proceeds of the fire insurance in reduction of the said mortgage, the Landlord shall endeavor to raise a fund equal to the net proceeds of such insurance, and if successful shall make such fund available to the Tenant for the purpose of such repairs or rebuilding. If the Landlord is unable to raise such fund

within ninety (90) days, the Tenant may cancel this lease upon thirty (30) days' written notice, or may advance toward the cost of the repairs or rebuilding an amount equal to the insurance proceeds applied by the mortgagee. The Tenant shall have the right to offset its claim for such advance, with interest thereon, against any rent accruing hereunder until the advance and interest shall have been repaid to the Tenant in full.

(C) If any building erected upon the demised premises shall be damaged or destroyed by fire or other casualty during the last thirty (30) months of the term, the Tenant shall not be required to rebuild the same. The rent shall be adjusted to the date of such fire or other casualty, and thereupon this lease shall terminate.

(D) If this lease is terminated pursuant to this Paragraph "23", the proceeds of all insurance policies shall belong to the Landlord. However, the Landlord shall pay to the Tenant, upon the latter's removal from the demised premises, a sum equal to the value of the unexpired term of the lease. If the parties cannot agree upon such value, the amount shall be fixed by arbitration through the American Arbitration Association, under its rules then in effect.

24. Both parties waive all right to trial by jury in any summary proceedings instituted by the Landlord against the Tenant, or in any action to recover rent or any damages hereunder.

25. The Landlord covenants that the Tenant, on paying the stipulated rent, and upon performing the covenants above described, shall peacefully and quietly have, hold and enjoy the demised premises during the term hereof.

EXHIBIT C TO WIEN AFFIDAVIT

However, this covenant shall continue only during the Landlord's retention of title to the demised premises.

26. Any notice or demand given hereunder shall be sent by registered mail:

a) To the Tenant, at 350 Fifth Avenue, New York, New York, or at such other address as the Tenant may hereafter designate in writing.

b) To the Landlord, at 350 Fifth Avenue, NewYork, New York, or at such other address as the Landlord may hereafter designate in writing.

27. The Tenant waives all right to redeem under Paragraph 1437 of the Civil Practice Act.

28. This lease shall be binding upon and inure to the benefit of the successors, assigns, heirs and legal representatives of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

250 WEST 57TH ST. ASSOCIATES

By: Lawrence A. Wien

Lawrence A. Wien

Harry B. Helmsley

Irving Schneider

Bernard T. Hein

Henry K. Klein

Alvin S. Lane

EXHIBIT C TO WIEN AFFIDAVIT

William F. Purcell

Leo Greenstein

Frank N. Robinson

J. Herbert Leder

FISK BUILDING ASSOCIATES

By: _____
Harry B. Helmsley
Tenant

EXHIBIT C TO WIEN AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

On this 30th day of September, 1953, before me personally appeared LAWRENCE A. WIEN, HARRY B. HELMSLEY, IRVING SCHNEIDER, BERNARD T. HEIN, HENRY W. KLEIN, ALVIN S. LANE, WILLIAM F. PURCELL, LEO GREENSTEIN, FRANK N. ROBINSON and J. HERBERT LEDER, to me known and known to me to be all of the joint venturers associated under the name of 250 West 57th St. Associates, and known to me to be the individuals described in and who executed the foregoing instrument in the name of 250 West 57th St. Associates, and they severally duly acknowledged to me that they executed the same as and for the act and deed of said 250 West 57th St. Associates.

Patricia Ann Lass

PATRICIA ANN LASS
Notary Public, State of New York
No. 24-2256025
Qualified in Kings County
Certs. filed with Kings, N.Y. & Nassau
County Clerks and Registers
Commission Expires March 30, 1955

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

On this 30th day of September, 1953, before me personally appeared HARRY B. HELMSLEY, to me known and known to me to be a partner in the firm of Fisk Building Associates, and known to me to be the individual described in and who executed the foregoing instrument in the firm name of Fisk Building Associates, and he duly acknowledged to me that he executed the same for and on behalf of the said firm.

Patricia Ann Lass

PATRICIA ANN LASS
Notary Public, State of New York
No. 24-2256025
Qualified in Kings County
Certs. filed with Kings, N.Y. & Nassau
County Clerks and Registers
Commission Expires March 30, 1955

250 WEST 57TH ST. ASSOCIATES

TO

FISK BUILDING ASSOCIATES

Agreement of Lease

September 30, 1953

WIEN, LANE, KLEIN & PURCELL
ATTORNEYS AT LAW
EMPIRE STATE BUILDING
NEW YORK 1, N. Y.

EXHIBIT C TO WIEN AFFIDAVIT

MODIFICATION AGREEMENT dated this 13th day of June, 1961, by and between 250 WEST 57TH ST. ASSOCIATES, a joint venture, having its office at 60 East 42nd Street, New York, New York (herein called "Landlord"), and FISK BUILDING ASSOCIATES, a partnership, having its office at 60 East 42nd Street, New York, New York (herein called "Tenant").

W I T N E S S E T H:

WHEREAS, on September 30, 1953, a lease covering the entire premises known as the Fisk Building, located at 250 West 57th Street, New York, New York, was made between Landlord and Tenant's predecessor, a partnership also known as Fisk Building Associates, which lease was assigned on May 1, 1954, by said predecessor to Tenant; and

WHEREAS, a modernization program is required to maintain the competitive position of the Fisk Building; and

WHEREAS, Landlord is willing to make funds available for such improvements, and Tenant is willing to apply the funds, as agent for Landlord, to the making of such improvements.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, it is agreed as follows:

1. On or about October 1, 1961, Landlord shall increase the first mortgage loan on the premises by Four Hundred Thousand Dollars ($400,000). Landlord will forthwith turn over to Tenant the entire proceeds of such loan, to be held and applied by Tenant as agent for Landlord as hereinbelow provided.

2. Tenant shall use the entire proceeds for the modernization of the building, including (a) the conversion of nine of the twelve elevators in the building to automatic operation, in accordance with the detailed specifications

prepared by Marcato Elevator Company, Inc., and dated May 31, 1961 and (b) the installation of additional electric power, including a new 4,000 ampere service switch and two risers with a capacity of 380 amperes each and the conversion of a DC riser to AC.

All such work shall be done by Tenant as agent for Landlord and for the account of Landlord, and when completed shall be the property of Landlord. All such work shall be commenced promptly and prosecuted with due diligence.

3. Paragraph 2 (A) of the lease is hereby modified to read as follows:

"2 (A). The Tenant covenants to pay rent, in equal monthly installments, in advance, on the first day of each month during said term, as follows:

From October 1, 1953 to February 28, 1954, the sum of Two Hundred Fifty Three Thousand Nine Hundred Fifty Eight and 33/100 Dollars ($253,958.33) in equal monthly payments of Fifty Thousand Seven Hundred Ninety One and 67/100 Dollars ($50,791.67);

From March 1, 1954 to September 30, 1961, the sum of Six Hundred Ninety Two Thousand Dollars ($692,000) per annum, in equal monthly payments of Fifty Seven Thousand Six Hundred Sixty Six and 67/100 Dollars ($57,666.67);

From October 1, 1961 to September 30, 1962, the sum of Seven Hundred Eight Thousand Dollars ($708,000) per annum, in equal monthly payments of Fifty Nine Thousand Dollars ($59,000);

From October 1, 1962 to September 30, 1972, the sum of Seven Hundred Forty Eight Thousand Dollars ($748,000) per annum, in equal monthly payments of Sixty Two Thousand Three Hundred Thirty Three and 33/100 Dollars ($62,333.33);

EXHIBIT C TO WIEN AFFIDAVIT

From October 1, 1972 to September 30, 1978, the sum of Seven Hundred Thirty Thousand Dollars ($730,000) per annum, in equal monthly payments of Sixty Thousand Eight Hundred Thirty Three and 33/100 Dollars ($60,833.33)."

4. Paragraph 3 is hereby modified to read as follows:

"3. The Tenant may renew this lease for an additional period of twenty five (25) years upon the same terms and conditions, except the clause relevant to renewal and except that the rental for the period from October 1, 1978 to September 30, 1982 shall be Seven Hundred Thirty Thousand Dollars ($730,000) per annum, payable in equal monthly payments of Sixty Thousand Eight Hundred Thirty Three and 33/100 Dollars ($60,833.33), and the rental for the period from October 1, 1982 to September 30, 2003 shall be Seven Hundred Twelve Thousand Dollars ($712,000) per annum, payable in equal monthly payments of Fifty Nine Thousand Three Hundred Thirty Three and 33/100 Dollars ($59,333.33). Tenant may renew this lease as aforesaid provided that the Tenant is not in default hereunder and provided further that the Tenant gives to the Landlord at least ninety (90) days' written notice of renewal".

5. The lease as herein modified shall remain in full force and effect.

EXHIBIT C TO WIEN AFFIDAVIT

6. This agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have set their hands as of the day and year first above written.

250 WEST 57TH ST. ASSOCIATES

By _____
Lawrence A. Wien, Joint Venturer

_____
Henry W. Klein, Joint Venturer

_____
Alvin S. Lane, Joint Venturer

_____
Alvin Silverman, Joint Venturer

_____
Fred Linden, Joint Venturer

FISK BUILDING ASSOCIATES

By _____
Harry B. Helmsley, Partner

EXHIBIT C TO WIEN AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 12th day of June, 1961, before me personally came LAWRENCE A. WIEN, HENRY W. KLEIN, ALVIN S. LANE, ALVIN SILVERMAN and FRED LINDEN, to me known and known to me to be the individuals described in and who executed the foregoing instrument and acknowledged to me that they executed the same.

Evelyn J. Rettmer

EVELYN J. RETTMER
Notary Public, State of New York
No. 30-8550215
Qualified in Nassau County
Cert. Filed in New York County
Term Expires March 30, 1962

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 12th day of June, 1961, before me personally appeared HARRY B. HELMSLEY, to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Evelyn J. Rettmer

EVELYN J. RETTMER
Notary Public, State of New York
No. 30-8550215
Qualified in Nassau County
Cert. Filed in New York County
Term Expires March 30, 1962

EXHIBIT C TO WIEN AFFIDAVIT

250 WEST 57th STREET ASSOCIATES,
LANDLORD,

FISK BUILDING ASSOCIATES,
TENANT,

MODIFICATION OF LEASE

DATED: JUNE 12, 1961

Effecting Fisk Building
located at 250 West 57th St.
New York City, N.Y.

WIEN, LANE & KLEIN
ATTORNEYS AT LAW
LINCOLN BUILDING
60 EAST 42ND STREET
NEW YORK 17, N.Y.

EXHIBIT C TO WIEN AFFIDAVIT

SECOND MODIFICATION AGREEMENT, dated this 10th day of June, 1965, and effective as of the 1st day of July, 1965, by and between 250 WEST 57TH ST. ASSOCIATES, a joint venture, having its office at 60 East 42nd Street, New York, New York (herein called "Landlord") and FISK BUILDING ASSOCIATES, a partnership, having its office at 60 East 42nd Street, New York, New York (herein called "Tenant").

W I T N E S S E T H :

WHEREAS, on September 30, 1953 a lease covering the entire premises known as the Fisk Building, located at 250 West 57th Street, New York, New York, was made between Landlord and Tenant's predecessor, a partnership also known as Fisk Building Associates, which lease was assigned on May 1, 1954 by said predecessor to Tenant; and

WHEREAS, on June 12, 1961, said lease was modified by Modification Agreement between Landlord and Tenant; and

WHEREAS, a modernization program is required to maintain the competitive position of the Fisk Building; and

WHEREAS, Landlord and Tenant are each willing to make funds available for such program and Tenant is willing to apply the funds of Landlord, as agent for Landlord, toward the cost of such program.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, it is agreed as follows:

1. The Tenant shall spend at least Forty Thousand ($40,000) Dollars a year for the next four years toward the cost of the modernization program described below.

2. The Landlord shall spend Seventy-two Thousand ($72,000) Dollars a year for the next four years toward the cost of the modernization program described below.

3. All work done by the Tenant with the monies of the Landlord shall be done as agent for the Landlord and for the account of the Landlord, and when completed shall become the property of the Landlord.

4. The modernization program shall involve a total expenditure of at least Four Hundred Forty-eight Thousand ($448,000) Dollars and shall consist of the following:

(i) Modernization of public corridors, including installation of recessed fluorescent lighting fixtures, acoustical hung ceilings and asphalt tile flooring, removal of windows for borrowed lights from the halls and replacement of fire tower doors, elevator hall lanterns and high rise freight elevator doors.

(ii) Modernization and rehabilitation of electrical system, including the installation of necessary equipment to increase the electrical capacity of the building, the balancing of existing lines and the installation of circuit breaker panel boards and new switchboards.

(iii) Modernization of washrooms, including new floor tiling, epoxy paint on walls and new flushometers.

(iv) Modernization of the Eighth Avenue Entrance.

(v) Further extension of the air-conditioning system into tenants' spaces.

(vi) If the actual cost of the work outlined above is less than $448,000, the Tenant will do additional work to reach the total expenditure of $448,000. The additional work may include modernization of tenants' spaces by installation of fluorescent lighting, acoustical ceilings and new flooring.

5. The lease as modified by the Modification Agreement of June 12, 1961 and as herein further modified shall remain in full force and effect.

EXHIBIT C TO WIEN AFFIDAVIT

6. This agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands as of the day and year first above written.

250 WEST 57TH ST. ASSOCIATES

By _____
Lawrence A. Wien, Joint Venturer

By _____
Henry W. Klein, Joint Venturer

By _____
Alvin S. Lane, Joint Venturer

By _____
Alvin Silverman, Joint Venturer

By _____
Fred Linden, Joint Venturer

FISK BUILDING ASSOCIATES

By _____
Harry B. Helmsley, partner

EXHIBIT C TO WIEN AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On this 10th day of June, 1965, before me personally came LAWRENCE A. WIEN, HENRY W. KLEIN, ALVIN S. LANE, ALVIN SILVERMAN and FRED LINDEN, to me known and known to me to be the individuals described in and who executed the foregoing instrument and acknowledged to me that they executed the same.

Laura Bernstein
LAURA BERNSTEIN
Notary Public, State of New York
No. 03-[illegible]
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1967

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On this 10th day of June, 1965, before me personally came HARRY B. HELMSLEY, to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Laura Bernstein
LAURA BERNSTEIN
Notary Public, State of New York
No. [illegible]
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1967

250 WEST 57TH ST. ASSOCIATES

WITH

FISK BUILDING ASSOCIATES

SECOND
MODIFICATION AGREEMENT

Dated: June 10, 1965

WIEN, LANE & KLEIN
ATTORNEYS AT LAW
LINCOLN BUILDING
60 EAST 42ND STREET
NEW YORK 17, N.Y.

EXHIBIT C TO WIEN AFFIDAVIT

E

EXHIBIT E TO WIEN AFFIDAVIT
FORM OF PARTICIPATING AGREEMENT
FOR 250 WEST 57TH STREET ASSOCIATES

AGREEMENT, made this 30th day of September, 1953, among , residing at , hereinafter called the "Agent"; and

W I T N E S S E T H

WHEREAS, the Agent is or will be the owner of an undivided one-tenth (1/10) interest in the land and building known as the Fisk Building at 250-264 West 57th Street, in the Borough of Manhattan, City, County and State of New York, which interest is herein referred to as "The Property"; and

WHEREAS, the parties hereto have arranged to share the ownership of The Property, and wish to define their rights and obligations with respect thereto;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

FIRST: A joint venture is hereby formed which shall own The Property. It is acknowledged that each of the parties has contributed to the cost of The Property the amount indicated below:

EXHIBIT E TO WIEN AFFIDAVIT

SECOND: The parties acknowledge that The Property is owned by them in undivided fractional parts as follows:

EXHIBIT E TO WIEN AFFIDAVIT

THIRD: The joint venture shall continue until The Property shall have been disposed of, in accordance with Paragraph "Fifth" hereof.

FOURTH: The record title to The Property shall remain in the name of but he shall act as Agent for the joint venture in such ownership, and all profits and losses arising from the ownership of The Property shall be shared by the parties in proportion to their respective fractional interests. The Agent shall have the power to deal with The Property as though he were the sole owner thereof, subject, however, to the terms of this agreement. Any action taken by the Agent with respect to The Property shall bind the joint venture. The Agent shall receive no compensation for acting as the representative of the parties.

FIFTH: The Agent shall not agree to sell, mortgage or transfer The Property, nor to modify any existing lease affecting the aforesaid premises, nor to make any new lease affecting the same, without the consent of the parties owning at least three-fourths (3/4) of The Property.

SIXTH: The Agent shall not be personally liable for any act performed in good faith, nor for anything save willful misconduct or gross negligence. The parties shall indemnify the Agent, in proportion to their interests in The Property, against any liability to which the Agent may be subjected by reason of title to The Property being in his name.

SEVENTH: If the Agent, or any successor hereinafter appointed, shall desire to terminate the agency, the

Agent shall, upon accounting to his successor for all funds which have previously come into his possession, be discharged from all further liability as Agent.

In the event of the resignation, death, incompetency or other disability of the Agent during the continuance of the joint venture, the following persons shall act as his successors in the order listed:

1.

2.

3.

4. Any person of full age designated in writing by parties owning at least three-fourths (3/4) of The Property.

Such successors shall have the same rights and obligations as the Agent named herein.

Simultaneously with the execution of this agreement, the Agent shall execute a quit-claim deed covering The Property, leaving blank the name of the grantee. This deed shall be deposited in escrow, together with the original copy of this agreement, with Wien, Lane, Klein & Purcell, Esqs., 350 Fifth Avenue, New York 1, New York. Upon the appointment of a successor to the Agent pursuant to this paragraph, the name of such successor shall be inserted in the deed and the escrow shall be released. The successor shall thereupon similarly execute a deed for possible use by his successor in the same manner.

EIGHTH: The sale or transfer of the interest of any party shall not be valid unless the transferee is an individual of full age, unless a duplicate original of the written instrument evidencing such sale or transfer is delivered to the Agent for deposit with the original copy of

this agreement, and unless the transferee shall accept the transfer in writing. Thereupon, the transferee shall be a member of the joint venture with the same rights and liabilities as the transferor.

NINTH: Upon the death of any party hereto, the joint venture shall continue without interruption. The deceased party may designate any individual of full age to succeed him as a member of the joint venture, and all parties agree to accept such designee in place of the deceased party. The designation shall be made in the Last Will and Testament of the deceased party or, if not so made, the executor or administrator of the deceased party shall make such designation, Any individual so designated shall accept such designation in writing, and shall then be a member of the joint venture with the same rights and liabilities as the deceased party.

In the event that any party dies and no successor for him is qualified within six (6) months after his death, the surviving parties may purchase the interest of the deceased party in the joint venture and in The Property within thirty (30) days after the expiration of such six (6) months' period, and the surviving parties shall share in such purchase in proportion to their respective fractional interests. The price shall be the original cost of the deceased party's interest, less any capital repaid thereon since the inception of this joint venture.

TENTH: Any dispute regarding this agreement or The Property shall be settled by arbitration in the City of New York in accordance with the rules of the American Arbitration Association then in effect, and such decision shall be binding upon all of the parties.

EXHIBIT E TO WIEN AFFIDAVIT-

ELEVENTH: This agreement shall be binding upon the heirs, legal representatives, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

EXHIBIT G TO WIEN AFFIDAVIT

G.

ONALD A. BETTEX
ARTIN B. COWAN
ALPH W. FELSTEIN
ELVYN H. HALPER
TANLEY KATZMAN
LVIN S. LANE
RED LINDEN
ILLIAM JAY LIPPMAN
OHN [illegible] LOEHR
[illegible] A. MACHLEDER
L. MALKIN
N D. NEWMAN
VIN SILVERMAN
. MICHAEL SPERO
OBERT I. WEISSMANN
AWRENCE A. WIEN

WIEN, LANE & MALKIN
COUNSELLORS AT LAW
LINCOLN BUILDING
60 EAST 42ND STREET
NEW YORK, NEW YORK 10017

TELEPHONE: (212) 687-8700 • CABLE: LAWWIEN

RICHARD H. ABELSON
GERALD EINHORN
JEFFERY K. GALLIN
ALAN D. GORDON
MITCHELL J. NELSON
STEPHEN SCHLAKMAN
RICHARD A. SHAPIRO
ALBERT J. WILSON

April 10, 1975

TO PARTICIPANTS IN 250 WEST 57th STREET ASSOCIATES:

Messrs. Alvin S. Lane, Fred Linden, Alvin Silverman and I, as Agents for Participants in 250 West 57th Street Associates ("Associates"), are soliciting the consent of the Participants to a program involving an increase in the first mortgage covering the Fisk Building, the utilization of the additional mortgage proceeds for physical improvements to the property and a modification of the rental provisions in the net lease under which Fisk Building Associates operates the property. Specific details regarding this program are set forth below.

I. Background

1. The Fisk Building, 250 West 57th Street, New York City, occupies the block front on the south side of 57th Street between Broadway and Eighth Avenue. The size of the plot is approximately 22,000 square feet. The building, erected in 1921, is a 26 story office building of brick, steel and concrete construction, containing approximately 355,000 square feet of rentable space.

2. Associates purchased the property on September 30, 1953 for $3,600,000 cash above a first mortgage of $3,500,000. This mortgage has been refinanced from time to time, the last such refinancing having taken place on May 1, 1970, at which time the mortgage was extended for five years, with monthly payments of $24,000, applied first to interest at the rate of 9-1/4% per annum and the balance in reduction of principal. This mortgage matures on May 1, 1975, at which time the unpaid balance will be $2,978,905.

3. Since September, 1953, the property has been operated by Fisk Building Associates under a net lease (the "Net Lease"). The Net Lease provides for an initial term of

(over)

25 years expiring on September 30, 1978, with one 25 year renewal option. The rent provisions of the Net Lease have been modified from time to time. The Net Lease currently provides for a minimum basic rent of $730,000 a year until September 30, 1982. Thereafter the basic rent reduces to $712,000 a year. The Net Lease also provides for overage rent in the amount of 50% of the lessee's operating profits in excess of $100,000 in any year.

4. At the inception of this investment in 1953, basic distributions to Participants were at the rate of $1,200 a year on each $10,000 participation. Since that time, basic distributions have varied from time to time depending upon factors such as changes in the basic rent under the Net Lease, changes in mortgage charges and the utilization of a portion of the funds available for distribution to pay for capital improvement programs. At the present time, basic distributions are at the rate of $1,150 a year on each original $10,000 participation. Since the inception of this investment, the holder of a $10,000 participation has received aggregate distributions in the amount of $28,199. Approximately $21,000 of this amount has constituted reportable income for federal income tax purposes. The balance has constituted a non-taxable return of capital.

5. Fisk Building Associates, the net lessee of the property, is a partnership in which Peter L. Malkin, Alvin S. Lane, Alvin Silverman and I are among the members. Harry B. Helmsley, the President of Helmsley-Spear, Inc. and Irving Schneider, one of its Executive Vice-Presidents, are also members of the lessee partnership. There is enclosed herewith an unaudited operating statement of Fisk Building Associates for the three years ended September 30, 1974 and for the five months ended February 28, 1975 (with the comparable five month period of the preceding year). As there shown, although operations for the 1972 and 1973 fiscal years were profitable, the year ended September 30, 1974 resulted in a loss of approximately $50,000. The loss for the first five months of the current fiscal year was almost $109,000 and in the opinion of the lessee, the rate of loss will accelerate, at least through 1976.

The current unfavorable operating results reflect the generally depressed economic conditions affecting the Manhattan office building rental market. The lessee believes that such conditions will continue for the foreseeable future. Although the building is currently approximately 92% occupied, even this occupancy rate has been achieved only as a result of very substantial expenditures for tenant installations and

by the acceptance of rental rates which make it impossible for the net lessee to achieve profitable results under the existing terms of the Net Lease. Moreover, there are additional potential vacancies of approximately 24,000 square feet (6.5% of the building) under space leases expiring on April 30, 1975, and the net lessee has been advised that the New York State Council of the Arts, which occupies 16,000 square feet (4.4% of the building) under month-to-month leases, is considering moving to other quarters. While the building will not lose all of the tenants which are currently potential vacancies, substantial capital expenditures will undoubtedly be required to retain some of those tenants and to attract replacements for those who do vacate.

The net lessee believes that in the long run, the operation of the Fisk Building will once again become more profitable. However, it is unwilling to continue the operation of the property and to undertake the substantial expenditures which may be involved unless it obtains the cooperation of Associates in the form of approval of the utilization of mortgage proceeds and the lease modification described below. The Net Lease currently provides that the net lessee may terminate the lease on sixty days prior written notice, without any further liability.

II. Terms of Proposed Mortgage Refinancing and Utilization of Proceeds

1. The present holder of the first mortgage, The Seamen's Bank for Savings, has agreed to refinance its mortgage upon the following terms:

a) The principal amount of the mortgage will be increased by $271,095, from $2,978,905 to $3,250,000.

b) The term of the mortgage will be extended for five years, to May 1, 1980.

c) The new mortgage will require constant annual payments of $314,280, to be applied first to interest at the rate of 9-1/4% per annum and the balance in reduction of principal. These constant payments represent an increase of $26,280 a year from the existing payments, which are at the rate of $288,000 a year.

2. The anticipated expenses in connection with the mortgage refinancing, including mortgage recording tax, title insurance costs, mortgagee's attorneys' fees and a fee of

$10,000 to Wien, Lane & Malkin, will be approximately $25,000. No brokerage commission will be paid.

3. Thus, the net additional proceeds from the refinancing (including a $1,037 amortization payment which will not be required on May 1, 1975) will be approximately $247,000. The commitment for the new mortgage requires that such proceeds be applied by Associates to pay for the cost of physical improvements to the property. Such improvements, which will include new tenant installations, will be designated by the net lessee. Until expended for this purpose, such excess proceeds will be held in a special escrow fund, at interest. Such interest will also be applied toward physical improvements to the property.

4. Associates will retain title to all improvements made with the mortgage proceeds and will be entitled to the tax benefit of their depreciation.

III. Modification of Net Lease Rental

1. As noted above, the Net Lease currently provides for an annual basic rent of $730,000. This rent is applied as follows:

Annual mortgage payments	$288,000
Distributions to Participants	$414,000
Wien, Lane & Malkin supervisory fees and disbursements	$ 28,000
	$730,000

The Net Lease also provides for overage rent equal to 50% of lessee's operating profit in excess of $100,000.

2. It is proposed that effective May 1, 1975, the rent payable under the net lease be revised, so that during the remainder of the initial term and the renewal term it will be as follows:

(a) a basic rent in the amount of $342,280, which will be utilized to pay mortgage charges of $314,280 a year under the first mortgage, as revised,

and $28,000 a year to Wien, Lane & Malkin for supervisory fees and disbursements. If the closing of the mortgage refinancing is postponed beyond May 1, 1975, the basic rent until the mortgage refinancing is effected will be at the rate of $28,000 per annum, plus the present mortgage charges.

Upon any further refinancing of the first mortgage, the basic rent will be modified and will be equal to the sum of $28,000, plus an amount equal to the revised constant payments for interest and amortization computed on the principal balance of the mortgage prior to such refinancing. In the event that the first mortgage is refinanced so as to increase the principal balance thereof, the basic rent will not be modified to include the charges on the additional portion of the first mortgage. Rather, Associates will have to pay such charges out of the primary overage rent described below.

(b) A primary overage rent equal to the first $414,000 per annum of the net operating profit of the property (after deduction of the basic rent described above). The full annual primary overage rent, if paid, will equal 11-1/2% of the original $3,600,000 cash investment. Commencing May 1, 1975 the lessee will pay advances against the primary overage rent at the rate of $288,000 a year (8% on $3,600,000). After the operating results for the fiscal year ending September 30, 1975 are available, advances against primary overage rent will be adjusted to reflect the actual net operating profit of the property for the period May 1, 1975 through September 30, 1975. Any excess profit up to the pro rata portion of the aforementioned $414,000 will be paid to Associates as part of the primary overage rent (and distributed to Participants), and any amount by which the profit is less than the pro rata portion of the aforementioned $414,000 will be deducted from advances during the remainder of the subsequent fiscal year. A similar adjustment will be made annually.

(c) A secondary overage rent consisting of 50% of the net operating profit of the property (after payment of basic rent and primary overage rent).

3. In computing net operating profit for purposes of primary overage rent and secondary overage rent, the lessee may, at its option, deduct the cost of any capital improvement (other than those made with the excess proceeds of the mortgage refinancing) as an expense in the year in which such cost is paid.

4. The lessee will not be entitled to recoup any losses incurred by it through April 30, 1975 against the primary overage rent or secondary overage rent described above, but will be entitled to such recoupment with respect to any losses incurred thereafter.

(over)

5. The modification of the lease terms described above will result in a reduction of regular monthly distribution to participants, which are currently at the rate of $95.83 a month on each $10,000 participation. Commencing June 1, 1975 and continuing until the first adjustment in the primary overage rent described above, such monthly distributions will be at the rate of $66.66 a month.

IV. Terms of Solicitation of Consents

The consents of the holders of 75% of the outstanding participations in Associates are required in order to authorize the program described herein. If the requested consents are not received, Associates will be unable to effect the mortgage extension and modification and unless funds with which to repay the mortgage can be obtained from other sources, the possibility of foreclosure exists.

No Agent in his capacity as agent receives any remuneration from Associates. As noted above, my firm receives supervisory fees of $28,000 a year from which it pays all regular accounting fees and other disbursements. Wien, Lane & Malkin is also entitled to receive 10% of any overage rent received by Associates in any year in excess of an amount sufficient to permit total distributions to Participants at the rate of 15% of the original cash investment. Wien, Lane & Malkin received no such additional compensation for the fiscal year ended September 30, 1974 and none is anticipated for the current fiscal year. For your additional information, financial statements of Associates for the three years ended September 30, 1974 and the three months ended December 31, 1974 and December 31, 1973, are enclosed.

Participations in Associates representing an original cash investment of $3,600,000 are currently outstanding, divided among the Joint Venture interests in Associates which Messrs. Lane, Linden, Silverman, and I hold as Agents. At March 2, 1975, I held of record as executor, but not beneficially, a $5,000 participation in Associates. At that date, Alvin S. Lane and the wife of Fred Linden each owned, of record and beneficially, a $5,000 participation in Associates and Mr. Lane and Mr. Linden held, of record as trustees, but not beneficially, a $5,000 participation and a $10,000 participation, respectively.

The solicitation of consents will terminate 60 days after the date of this letter, but may be extended for another 90 days if consents are received from the owners of at least 40% of the outstanding participations during the initial 60-day period. Only Participants of record on

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the date of this letter may approve or disapprove the proposed program. Approval once given is irrevocable. It is anticipated that this letter will be mailed on April 10, 1975. We will advise all participants of the final result.

If you have any question or desire any additional information concerning this program, please communicate with William J. Lippman, Robert I. Weissmann or Peter L. Malkin of Wien, Lane & Malkin.

Cordially yours,

Lawrence A. Wien

EXHIBIT G TO WIEN AFFIDAVIT

C O N S E N T

(SOLICITED BY LAWRENCE A. WIEN,
ALVIN S. LANE, FRED LINDEN AND
ALVIN SILVERMAN AS AGENTS)

As a participant in 250 West 57th Street Associates, the owner of the Premises, 250 West 57th Street, New York City, I hereby

_____ Consent

_____ Do Not Consent

to the program for the increase and extension of the first mortgage on premises 250 West 57th Street, New York, N.Y., the utilization of the excess mortgage proceeds and the modification of the net lease, all on the terms outlined in the letter of Lawrence A. Wien, dated April 10, 1975.

Dated:

_____
Signature

_____
Please Print Name Here

THE SOLICITATION OF CONSENTS WILL TERMINATE ON JUNE 9, 1975, BUT MAY BE EXTENDED UNTIL SEPTEMBER 8, 1975, IF CONSENTS ARE RECEIVED FROM THE OWNERS OF AT LEAST 40% OF THE INVESTMENT PRIOR TO JUNE 10, 1975.

IF THIS FORM IS SIGNED AND RETURNED WITHOUT A CHOICE INDICATED, CONSENT WILL BE DEEMED TO HAVE BEEN GIVEN.

EXHIBIT G TO WIEN AFFIDAVIT

Jacobs, Evall, Hirson & Company

CERTIFIED PUBLIC ACCOUNTANTS

DAVID B. JACOBS
LAWRENCE R. HIRSON
IRVING EVALL
SHELDON BLUMENFELD
ARNOLD M. MALAKOFF
MARVIN J. GARDIAN
MARVIN KALICKSTEIN

RICHARD S. UNTERBERGER
STEPHEN H. BAER

19 RECTOR STREET
NEW YORK, N. Y. 10006

(212) 344-7970

ACCOUNTANTS' REPORT

TO 250 WEST 57TH ST. ASSOCIATES
(A JOINT VENTURE)

WE HAVE EXAMINED THE ACCOMPANYING BALANCE SHEET OF 250 WEST 57TH ST. ASSOCIATES AS AT SEPTEMBER 30, 1974, AND THE RELATED STATEMENTS OF OPERATIONS, CAPITAL, AND CHANGES IN FINANCIAL POSITION FOR THE THREE YEARS THEN ENDED. OUR EXAMINATION WAS MADE IN ACCORDANCE WITH GENERALLY ACCEPTED AUDITING STANDARDS, AND ACCORDINGLY INCLUDED SUCH TESTS OF THE ACCOUNTING RECORDS AND SUCH OTHER AUDITING PROCEDURES AS WE CONSIDERED NECESSARY IN THE CIRCUMSTANCES.

IN OUR OPINION, THE STATEMENTS MENTIONED ABOVE PRESENT FAIRLY THE FINANCIAL POSITION OF 250 WEST 57TH ST. ASSOCIATES AS AT SEPTEMBER 30, 1974 AND THE RESULTS OF ITS OPERATIONS AND CHANGES IN ITS FINANCIAL POSITION FOR THE THREE YEARS THEN ENDED IN CONFORMITY WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES APPLIED ON A CONSISTENT BASIS.

Jacobs Evall Hirson & Company
CERTIFIED PUBLIC ACCOUNTANTS

NEW YORK, N. Y.
NOVEMBER 19, 1974

Jacobs, Evall, Hirson + Company

240 WEST 57TH ST. ASSOCIATES

Jacobs, Evall, Hirson + Company

BALANCE SHEET

		SEPTEMBER 30, 1974 (AUDITED)		
ASSETS				
CURRENT ASSETS:				
CASH ON DEPOSIT IN NATIONAL BANK OF NORTH AMERICA			$ 58,521	
FIXED ASSETS: (NOTE 1)				
REAL PROPERTY SITUATED AT 240 WEST 57TH STREET, NEW YORK, N. Y., AT COST:				
LAND		$2,117,435		
BUILDING	$4,940,682			$4,940,682
LESS: ACCUMULATED DEPRECIATION	3,458,477	1,482,205		3,439,649
BUILDING IMPROVEMENTS	688,000			688,000
LESS: ACCUMULATED DEPRECIATION	362,310	325,690		371,357
			3.925,330	
DEFERRED CHARGES:				
COSTS INCIDENTAL TO THE ISSUANCE OF PARTICIPATIONS (NOTE 2)			41,883	
TOTAL ASSETS			$4,025,734	
LIABILITIES AND CAPITAL				
CURRENT LIABILITIES:				
ACCRUED INTEREST PAYABLE		$ 23.017		
BONDS, MORTGAGES AND SIMILAR DEBT (NOTE 3):				
PRINCIPAL PAYMENTS DUE WITHIN ONE YEAR		2,985,949		
			3,008,966	
CAPITAL			1,016,768	
TOTAL LIABILITIES AND CAPITAL			$4,025,734	

December 31, 1974 (Consolidated)

ASSETS			
CURRENT ASSETS:			
CASH ON DEPOSIT IN NATIONAL BANK OF NORTH AMERICA		$ 58,521	
FIXED ASSETS: (NOTE 1)			
REAL PROPERTY SITUATED AT 240 WEST 57TH STREET, NEW YORK, N. Y., AT COST:			
LAND	$2,117,435		
BUILDING			
LESS: ACCUMULATED DEPRECIATION	1,441,033		
BUILDING IMPROVEMENTS			
LESS: ACCUMULATED DEPRECIATION	315,643		
		3,875,111	
DEFERRED CHARGES:			
COSTS INCIDENTAL TO THE ISSUANCE OF PARTICIPATIONS (NOTE 2)		41,883	
TOTAL ASSETS		$3,975,515	
LIABILITIES AND CAPITAL			
CURRENT LIABILITIES:			
ACCRUED INTEREST PAYABLE	$ 22,993		
BONDS, MORTGAGES AND SIMILAR DEBT (NOTE 3):			
PRINCIPAL PAYMENTS DUE WITHIN ONE YEAR	2,982,977		
		3,005,970	
CAPITAL		969	
TOTAL LIABILITIES AND CAPITAL		$3,975,515	

THE ACCOMPANYING NOTES ARE AN INTEGRAL PART OF THESE FINANCIAL STATE

EXHIBIT G TO WIEN AFFIDAVIT

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EXHIBIT G TO WIEN AFFIDAVIT

Ja[illegible]. Evall, Hirson & Company

250 WEST 57TH ST. ASSOCIATES

STATEMENT OF OPERATIONS

	For the Years Ended September 30,			For the Three Months Ended December 31,	
	1974 (Audited)	1973 (Audited)	1972 (Audited)	1974 (Unaudited)	1973 (Unaudited)
Income: (Note 4)					
Basic Rent Income	$730,000	$730,000	$748,000	$182,500	$182,500
Additional Rent Income	-	24,513	99,657	-	-
Total Income	730,000	754,513	847,657	182,500	182,500
Expenses:					
Interest on Mortgage (Note 3)	276,684	277,680	278,589	69,004	69,268
Supervisory Fees (Note 5)	28,000	28,000	28,000	7,000	7,000
Total Expenses Before Depreciation	304,684	305,680	306,589	76,004	76,268
Income Before Depreciation	425,316	448,833	541,068	106,496	106,232
Depreciation: (Note 1)					
Depreciation of Building	164,689	164,689	164,689	41,172	41,172
Depreciation of Building Improvements	36,188	36,188	36,188	9,047	9,047
Total Depreciation	200,877	200,877	200,877	50,219	50,219
Net Income	$224,439	$247,956	$340,191	$ 56,277	$ 56,013

THE ACCOMPANYING NOTES ARE AN INTEGRAL PART OF THESE FINANCIAL STATEMENTS.

EXHIBIT G TO WIEN AFFIDAVIT

Jo[illegible]s, Evall, Hirson & Company

250 WEST 57TH ST. ASSOCIATES

STATEMENT OF CAPITAL

	For the Years Ended September 30,			For the Three Months Ended December 31,	
	1974 (Audited)	1973 (Audited)	1972 (Audited)	1974 (Unaudited)	1973 (Unaudited)
Capital, Beginning of Period	$1,230,842	$1,498,043	$1,727,547	$1,016,768	$1,230,842
Net Income	224,439	247,956	340,191	56,277	56,013
	1,455,281	1,745,999	2,067,738	1,073,045	1,286,855
Partners' Drawings	438,513	515,157	569,695	103,500	128,013
Capital, End of Period	$1,016,768	$1,230,842	$1,498,043	$ 969,545	$1,158,842

During each of the periods, the joint venture consisted of ten groups, as follows:

Lawrence A. Wien, Joint Venture #1

Lawrence A. Wien, Joint Venture #2

Lawrence A. Wien, Joint Venture #3

Lawrence A. Wien, Joint Venture #4

Alvin Silverman, Joint Venture #1

Alvin Silverman, Joint Venture #2

Alvin Silverman, Joint Venture #3

Alvin S. Lane, Joint Venture #1

Alvin S. Lane, Joint Venture #2

Fred Linden

All located at 60 East 42nd Street, New York, N. Y.

Each of the above groups has a ten percent interest in the joint venture and receives distributions and shares in profits and losses equally. The beginning and ending capital accounts of each group are also equal.

The accompanying notes are an integral part of these financial statements.

Jacobs Ewell Hirson & Company

250 WEST 57TH ST. ASSOCIATES

STATEMENT OF CHANGES IN FINANCIAL POSITION

	For the Years Ended September 30,						For the Three Months Ended December 31,			
	1974 (Audited)		1973 (Audited)		1972 (Audited)		1974 (Unaudited)		1973 (Unaudited)	
Resources Provided										
Resources Provided from Operations:										
Net Income	$ 224,439		$247,956		$340,191		$ 55,277		$ 55,013	
Add, Expenses Not Requiring Outlay of Working Capital in Current Period:										
Depreciation	200,877	$ 425,316	200,877	$448,833	200,877	$541,068	50,219	$106,496	50,219	$106,232
Decrease in Working Capital (See Below)		2,999,146		77,553		38,867		-		24,753
TOTAL RESOURCES PROVIDED		$3,424,462		$526,386		$579,935		$106,496		$130,985
Resources Applied										
Cash Drawings	438,913		515,157		569,695		103,500		128,013	
Mortgage Debt Falling Due Within One Year	2,985,949		11,229		10,240		-		2,972	
Increase in Working Capital (See Below)	-		-		-		2,996		-	
TOTAL RESOURCES APPLIED		$3,424,462		$526,386		$579,935		$106,496		$130,985

CHANGES IN ELEMENTS OF WORKING CAPITAL

	For the Years Ended September 30,						For the Three Months Ended December 3.,			
	1974		1973		1972		1974		1973	
	Working Capital Increase	Working Capital Decrease	Working Capital Increase	Working Capital Decrease	Working Capital Increase	Working Capital Decrease	Working Capital Increase	Working Capital Decrease	Working Capital Increase	Working Capital Decrease
Cash				$ 1,500						
Additional Rent Due from Fisk Building Associates		$ 24,513		79,144		$41,337				$24,513
Accrued Interest Payable	$87		$79		$ 72		$ 24		$22	
Long-Term Debt (Current Portion)		2,974,720		988		901	2,972			262
Accrued Supervisory Fee					3,299					
	$87	2,999,233	$79	77,632	$3,371	42,238	2,996		$22	24,775
		87		79		3,371	-			22
DECREASE IN WORKING CAPITAL		$2,999,146		$77,553		$38,867				$24,753
INCREASE IN WORKING CAPITAL							$2,996			

The accompanying notes are an integral part of these financial statements.

EXHIBIT G TO WIEN AFFIDAVIT

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EXHIBIT G TO WIEN AFFIDAVIT

J. ...s. Evall, Hirson & Company

250 WEST 57TH ST. ASSOCIATES

NOTES TO FINANCIAL STATEMENTS

NOTE 1 - REAL PROPERTY:

THE BASIS FOR BUILDING VAL...TION WAS SEVENTY PER CENT (70%) OF THE TOTAL PURCHASE PRICE OF THE LAND AND BUILDING, $7,058,117, WHICH AMOUNTS TO $4,940,682. THE BALANCE OF THE PURCHASE PRICE, $2,117,435, WAS ALLOCATED TO LAND COST. THE SEVENTY PER CENT ALLOCATION OF TOTAL COST TO THE BUILDING WAS BASED UPON THE PERCENTAGE OF ASSESSED VALUATION OF THE BUILDING TO THE TOTAL ASSESSED VALUATION ON THE LAND AND BUILDING AT THE TIME OF ACQUISITION.

THE ASSESSED VALUATION WAS AS FOLLOWS:

LAND.....	$1,500,000	30%
BUILDING.....	3,500,000	70%
TOTAL	$5,000,000	100%

DEPRECIATION OF THE BUILDING (250 WEST 57TH ST.) IS PROVIDED FOR AT 3-1/3% OF THE COST OF $4,940,682, ON THE STRAIGHT-LINE METHOD.

THE INSTALLATION OF AUTOMATIC ELEVATORS AND OTHER BUILDING IMPROVEMENTS WERE COMPLETED DURING THE FISCAL YEARS ENDED SEPTEMBER 30, 1963, SEPTEMBER 30, 1964, SEPTEMBER 30, 1966, SEPTEMBER 30, 1967, AND SEPTEMBER 30, 1969 AT A TOTAL COST OF $688,000. THESE IMPROVEMENTS ARE BEING DEPRECIATED ON THE STRAIGHT-LINE METHOD FROM THEIR RESPECTIVE COMPLETION DATES TO THE REMAINING LIFE OF THE BUILDING, AS FOLLOWS:

FISCAL YEAR ENDED DURING WHICH IMPROVEMENTS WERE COMPLETED	COST	DATE OF COMPLETION	REMAINING LIFE OF BUILDING FROM COMPLETION DATE OF IMPROVEMENTS
SEPTEMBER 30, 1963	$361,000	APRIL 1, 1963	20-1/2 YEARS
SEPTEMBER 30, 1964	39,000	FEBRUARY 1, 1964	19-2/3 YEARS
SEPTEMBER 30, 1966	272,200	APRIL 1, 1966	17-1/2 YEARS
SEPTEMBER 30, 1967	6,000	OCTOBER 1, 1966	17 YEARS
SEPTEMBER 30, 1969	9,800	JULY 1, 1969	14-1/4 YEARS
	$688,000		

NOTE 2 - COSTS INCIDENTAL TO THE ISSUANCE OF PARTICIPATIONS:

THE COSTS INCIDENTAL TO THE ISSUANCE OF PARTICIPATIONS, IN THE AMOUNT OF $41,883, ARE ASSETS OF THE COMPANY DURING ITS EXISTENCE.

NOTE 3 - FIRST MORTGAGE PAYABLE:

THE SUBJECT MORTGAGE, ORIGINALLY ISSUED FOR A TOTAL OF $3,500,000 AND HELD BY THE SEAMEN'S BANK FOR SAVINGS IN THE CITY OF NEW YORK, ORIGINALLY MATURE. OCTOBER 4, 1964.

EXHIBIT G TO WIEN AFFIDAVIT

Messrs. Evall, Hirson & Company

250 WEST 57TH ST. ASSOCIATES

NOTES TO FINANCIAL STATEMENTS

(CONTINUED)

NOTE 3 - FIRST MORTGAGE PAYABLE: (CONTINUED)

THE MORTGAGE WAS MODIFIED EFFECTIVE OCTOBER 1, 1958. MONTHLY PAYMENTS OF $16,667, APPLIED FIRST TO INTEREST AT THE RATE OF 4-3/4% PER ANNUM AND THE BALANCE TO PRINCIPAL, COMMENCED NOVEMBER 1, 1958. FOR THE PERIOD APRIL 1, 1954 TO OCTOBER 1, 1958, MONTHLY PAYMENTS OF $20,000 WERE MADE COVERING INTEREST FIRST, AT THE RATE OF 4-1/2% PER ANNUM, THE BALANCE BEING APPLICABLE TO PRINCIPAL. PRIOR TO APRIL 1, 1954, THE MORTGAGE CALLED ONLY FOR INTEREST PAYMENTS ON THE ORIGINAL FACE AMOUNT OF THE MORTGAGE ($3,500,000).

ON SEPTEMBER 27, 1961, AN ADDITIONAL $400,000 WAS BORROWED AND CONSOLIDATED WITH THE THEN EXISTING FIRST MORTGAGE BALANCE OF $2,913,411 INTO A SINGLE FIRST MORTGAGE PAYABLE IN THE AMOUNT OF $3,313,411. THIS MORTGAGE REQUIRED MONTHLY PAYMENTS OF $18,000 APPLIED FIRST TO INTEREST AT THE RATE OF 5-1/2% PER ANNUM, AND THE BALANCE TO PRINCIPAL, COMMENCING NOVEMBER 1, 1961. THE CONSOLIDATED MORTGAGE MATURED APRIL 1, 1968 WITH A BALANCE OF $3,054,321.

ON DECEMBER 11, 1967, THE MORTGAGEE, THE SEAMEN'S BANK FOR SAVINGS, AGREED TO CONTINUE THE LOAN AS AN OPEN MORTGAGE SUBJECT TO THREE-MONTHS' NOTICE BEFORE REPAYMENT WAS REQUIRED OR MADE. FROM APRIL 1, 1968 TO DECEMBER 1, 1968, MONTHLY PAYMENTS CONTINUED AT $18,000, APPLIED FIRST TO INTEREST AT THE RATE OF 6% PER ANNUM, AND THE BALANCE TO PRINCIPAL. FROM JANUARY 1, 1969 TO MAY 1, 1970 THE MORTGAGE CONTINUED AS AN OPEN LOAN WITH MONTHLY PAYMENTS OF $18,000 APPLIED TO INTEREST ONLY AND NO AMORTIZATION OF PRINCIPAL REQUIRED. THE PRINCIPAL AMOUNT OF THE MORTGAGE ON JANUARY 1, 1969 WAS $3,027,945.

ON MAY 1, 1970 THE MORTGAGE WAS EXTENDED FOR FIVE YEARS, WITH MONTHLY PAYMENTS OF $24,000 APPLIED FIRST TO INTEREST AT THE RATE OF 9-1/4% PER ANNUM AND THE BALANCE TO PRINCIPAL. THE MORTGAGE MATURES ON MAY 1, 1975 WHEN THE BALANCE WILL BE $2,978,905.

NOTE 4 - RENT INCOME:

BASIC RENT INCOME IS RECEIVED UNDER LEASE WITH FISK BUILDING ASSOCIATES. THE LEASE INCLUDES AN INITIAL TERM OF TWENTY-FIVE YEARS THROUGH SEPTEMBER 30, 1978, WITH AN OPTION TO RENEW FOR ONE ADDITIONAL TERM OF TWENTY-FIVE YEARS. FOR THE PERIOD OCTOBER 1, 1962 THROUGH SEPTEMBER 30, 1972, THE ANNUAL RENT WAS $748,000. FOR THE PERIOD OCTOBER 1, 1972 THROUGH SEPTEMBER 30, 1982, THE ANNUAL RENT IS $730,000. FROM OCTOBER 1, 1982 THROUGH THE END OF THE RENEWAL PERIOD, RENT WILL BE $712,000 PER ANNUM.

ADDITIONAL RENT IS PAYABLE EQUIVALENT TO 50% OF THE LESSEE'S NET OPERATING PROFIT, AS DEFINED, IN EXCESS OF $100,000 PER ANNUM.

MESSRS. LAWRENCE A. WIEN, ALVIN S. LANE AND ALVIN SILVERMAN, PARTNERS IN 250 WEST 57TH ST. ASSOCIATES, ARE ALSO PARTNERS IN FISK BUILDING ASSOCIATES, THE LESSEE.

EXHIBIT G TO WIEN AFFIDAVIT

J. ...s. Evall, Hirson & Company

250 WEST 57TH ST. ASSOCIATES

NOTES TO FINANCIAL STATEMENTS

(CONTINUED)

NOTE 5 - SUPERVISORY FEES:

SUPERVISORY FEES (INCLUDING DISBURSEMENTS AND COST OF REGULAR ACCOUNTING SERVICES) DURING EACH PERIOD REPRESENTED FEES TO THE FIRM OF WIEN, LANE & MALKIN.

NOTE 6 - NUMBER OF PARTICIPANTS:

THERE WERE 475 PARTICIPANTS IN THE VARIOUS JOINT VENTURES AS AT DECEMBER 31, 1974.

NOTE 7 - DETERMINATION OF DISTRIBUTIONS TO PARTICIPANTS:

DISTRIBUTIONS TO PARTICIPANTS REPRESENT THE EXCESS OF INCOME RECEIVED OVER THE MORTGAGE REQUIREMENTS AND CASH EXPENSES AND, FOR THE YEAR ENDED SEPTEMBER 30, 1973, A DECREASE IN CASH ON DEPOSIT OF $1,500.

NOTE 8 - DISTRIBUTIONS AND AMOUNT OF INCOME PER $5,000 PARTICIPATION:

DISTRIBUTIONS PER $5,000 PARTICIPATION FOR EACH PERIOD CONSISTED OF THE FOLLOWING:

	Year Ended September 30,			Three Months Ended December 31,	
	1974	1973	1972	1974	1973
Income	$312	$344	$472	$ 78	$ 78
Return of Capital	297	371	319	66	100
Total Distributions	$609	$715	$791	$144	$178

THE JOINT VENTURE DOES NOT ITSELF PAY A TAX ON ITS INCOME; INSTEAD, ANY SUCH TAXES ARE PAID BY THE PARTICIPANTS IN THEIR INDIVIDUAL CAPACITIES.

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EXHIBIT G TO WIEN AFFIDAVIT A-103

Fisk Building Associates
Summary of Operations
(Unaudited)

The following summary of operations of Fisk Building Associates, the lessee of the Fisk Building 250 West 57th Street, New York, New York is unaudited and has been prepared in accordance with the provisions of the net lease between 250 West 57th St. Associates and Fisk Building Associates. The following information with respect to the five months ended February 28, 1975 and 1974 include all adjustments (consisting only of normal recurring accruals) which are, in the opinion of the partners of Fisk Building Associates, necessary to a fair statement of the results for such interim periods.

	For the Years Ended September 30,			For the Five Months Ended February 28,	
	1974	1973	1972	1975	1974
Income:					
Rent income	$2,090,972	$2,139,697	$2,090,147	$ 847,661	$ 832,543
Escalation rent income	269,710	270,128	249,648	117,460 (a)	90,439 (b)
Lease cancellation income	6,701	52,221	54,570	9,667	570
Other income	6,163	4,119	5,600	1,543	2,872
Electricity - net	9,561	14,559	14,746	23,370	32,504
Total income	2,383,107	2,480,724	2,414,711	999,701	1,008,928
Expenses:					
Rent expense	730,000	730,000	748,000	304,167	304,167
Labor costs	630,913	562,011	522,282	276,738	253,613
Real estate tax	607,854	562,874	495,724	269,610	246,994
Repairs and supplies	208,593	231,279	200,234	106,129	66,356
Management and leasing	90,000	120,000	42,000	37,500	37,500
Fuel oil	73,321	34,846	31,698	63,539	41,297
Other expenses	92,683	90,689	75,460	50,631	39,828
Total expenses	2,433,364	2,331,699	2,115,398	1,108,314	989,725
Net income (loss) before additional rent	(50,257)	149,025	299,313	(108,613)	19,203
Additional rent	-	24,513	99,657	-	-
Net income (loss)	($ 50,257)	$ 124,512	$ 199,656	($ 108,613)	$ 19,203

(a) Includes estimated escalation rent of $36,000
(b) Includes estimated escalation rent of $50,000

ABELSON AFFIDAVIT

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

STEVEN PAUL KESSLER, individually and as representative of a class,	:	CIVIL ACTION
Plaintiff,	:	75 CIV. 1890
-v-	:	AFFIDAVIT
LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57TH STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES, and WIEN, LANE & MALKIN,	:	
Defendants.	:	

CITY AND STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD H. ABELSON, being duly sworn, deposes and says:

1. I am an attorney associated with Wien, Lane & Malkin, the attorneys for 250 West 57th Street Associates ("Associates"), one of the defendants in the above entitled matter.

2. I make this affidavit in opposition to the Plaintiff's motion for a preliminary injunction and the other relief requested by Plaintiff in his order to show cause dated May 15, 1975. I am familiar with the facts hereinafter set forth, the basis of my knowledge being books and records of Associates and the files of Wien, Lane & Malkin, which are in my possession and under my control.

3. I respectfully refer this Court to the affidavit of Lawrence A. Wien, submitted simultaneously herewith which sets forth, in great detail, the facts and circumstances giving rise to this action. This affidavit is submitted as a brief statement of those facts as they apply to the law involved on Plaintiff's motion for a preliminary injunction. It is submitted as a supplement to the memorandum of law submitted by Paul, Weiss, Rifkind, Wharton & Garrison, counsel for the other Defendants in this action.

4. Associates is a joint venture holding the fee title to the real property located at 250-264 West 57th Street, New York, New York, commonly known and hereinafter referred to as the Fisk Building. Associates was so formed in 1953 for the express purpose of acquiring the title to

the Fisk Building and leasing that property to a partnership known as Fisk Building Associates ("FBA"). Defendants Lawrence A. Wien and Harry B. Helmsley were the original partners of FBA and were also co-venturers together with eight other individuals, in Associates. From the very inception of this transaction, there was, and still is, a community of interests in the landlord and tenant groups at the Fisk Building.

5. In July 1953, Associates, by prospectus ("Prospectus") duly filed as part of a registration statement with the Securities and Exchange Commission, offered for sale to the public a total of 710 participating units in the undivided interests in Associates of the 10 co-venturers. The total offering price was $3,550,000 which, together with the $50,000 invested by the 10 co-venturers, provided an original capital investment in Associates of $3,600,000.

6. One of the original investors was Plaintiff's father, Sam Kessler, who on September 30, 1953, purchased a $10,000 participating unit from one of the co-venturers and, as required, executed a Participating Agreement among himself, the other investors purchasing from that venturer and the

venturer who, pursuant thereto, acted as agent for that group in the management of their investments.

7. The Prospectus, which offered the securities for sale to the public clearly disclosed the following facts:

(a) There is an identity of some of the partners in interest in both Associates, the landlord, and FBA, the tenant.

(b) Several of the co-venturers of Associates and one of the partners of FBA are also partners in the law firm of Wien, Lane, Klein & Purcell, now constituted as Wien, Lane & Malkin, which represented both Associates and FBA; and

(c) The net lease to the Fisk Building contained among its terms, the right of FBA to cancel same on 60 days notice;

8. The Participating Agreement granted to each Participant, the right, among others, to:

(a) Share, in proportion to his respective fractional interest in Associates, its profits and losses;

(b) Participate in any decision to sell or mortgage the Fisk Building;

(c) Participate in any decision involving the modification of any existing net operating lease or the making of any such lease affecting the Fisk Building; and

(d) Participate under certain circumstances in choosing a successor agent.

10. It is apparent from the foregoing that the following facts are not subject to bona fide dispute:

(a) The Participants were always aware of the overlapping of interests among Associates, FBA and the law firm which represented both. Moreover, the purchase of the participations in Associates was to a great extent motivated by the reputation of Defendants Wien and Helmsley, both partners in FBA, in operating commercial office buildings in New York City. The Plaintiff's argument that there is a prohibited conflict of interest, which has wronged the Participants, is completely without merit;

(b) There have been distributions in excess of $28,000 made on the $10,000 participating unit which Plaintiff now holds.

11. The program to modify the lease and extend and refinance the mortgage, which was submitted to the Participants on April 10, 1975, was the result of several related factors. The New York City office rental market is at its lowest point in many years. In order to keep and attract

tenants at the Fisk Building, FBA has been required to expend enormous sums of money to make tenant improvements. These two factors, among others, have resulted in losses of more than $165,000 over the past 18 months, whereas for the 20 years prior to that time, the Fisk Building was always operated at a profit. Accordingly, the program which seeks to modify the lease to provide for rentals related to the profits and losses of Fisk Building, and to extend and refinance the mortgage and provide some of the funds necessary to make those tenant improvements, is, from the point of view of both Associates and FBA, a "package" transaction. It is also important to note that the mortgage on the Fisk Building expired on May 1, 1975, and had to be refinanced or paid off.

12. Unless some program were put into effect to make it economically feasible for FBA to continue operating the Fisk Building under the lease, it would have had no choice but to exercise its right to terminate on 60 days' notice. Certainly, a net lessee which can minimize its losses by discontinuing operations will elect to do so, when there is no suitable alternative.

13. It is respectfully submitted that what the Plaintiff has here done, apparently for his selfish purposes whatever they may be, will, if he is successful, create enormous

damage for his 474 co-Participants. If the program, as described in detail in the affidavit of Lawrence A. Wien submitted herewith, goes into effect the Plaintiff's income will be reduced by $29.17 per month, and that, only tentatively, until the profit of FBA has been determined after September 1975. On the other hand, he seeks an injunction which, if granted, can effectively bring the operation of the Fisk Building to a complete standstill. When the equities of the situation are weighed, Plaintiff's lack of right to obtain an injunction in this case is beyond serious argument.

14. The allegations of the complaint assume misstatements as fact and then draw legal conclusions therefrom. Even in the light of that rather shabby technique, the Plaintiff has not pleaded a fact which would substantiate any wrongdoing on the part of the defendants. I respectfully refer this Court to the Memorandum of Law submitted on behalf of the defendants other than Associates, which Memorandum is adopted on behalf of Associates.

WHEREFORE, I respectfully pray that the motion of the Plaintiff for a preliminary injunction be denied in all respects.

/s/
Richard H. Abelson

Sworn to before me this
22nd day of May, 1975.

NELIDA ALICIA SAPOT
Notary Public State of New York
No. 41-4518606
Qualified in Queens County
Commission Expires March 30, 1976

PRELIMINARY INJUNCTION HEARING

U.S. DISTRICT COURT
FILED
JUL 15 1975
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - -x

STEPHEN KESSLER, :

Plaintiff, :

v. : 75 Civ. 1890

LAWRENCE WIEN, et als, :

Defendants. :

- - - - - - - - - - - - - - - -x

New York, N. Y.
May 23, 1975
4 P. M.

BEFORE: HON. RICHARD OWEN, D. J.

APPEARANCES:

R. ALAN STOTSENBURG, ESQ.,
Attorney for the Plaintiff

WIEN, LANE & MALKIN, ESQS.,
Attorney for Defendant
250 West 57 Street Association
BY: RICHARD H. ABELSON, ESQ.,
ALAN D. GORDON, ESQ.,
Of Counsel

PAUL, WEISS, RIFKIND & GARRISON, ESQS.,
Attorneys for all other defendants
BY: SIMON H. RIFKIND, ESQ.,
Of Counsel

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(In open court.)

THE COURT: Mr. Stotsenburg.

MR. STOTSENBURG: I am Alan Stotsenburg, your Honor. I am sorry that there may have appeared to be some misunderstanding on the part of the plaintiff as to whether or not your Honor intended this to be an evidentiary hearing.

THE COURT: No problem.

MR. STOTSENBURG: It was our understanding it was. In drafting the motion papers I put an evidentiaryhearing for that purpose.

I notice, although your Honor made significant other changes, that it stayed in.

Although I had conversation with your clerk, when I was faced on Sunday of, I guess, last week with the problem of what do I do, I sat down and in my best judgment reached the conclusion that I had no other duty than to issue these subpoenas. So I want your Honor to understand I proceeded in good faith. And if your Honor does not desire to have that evidentiary hearing, all we have to do is make that clear upon the record and the matter will be clear.

We believe that we are entitled to one and that the Court of Appeals has so held. I have not cited such a case but I have one here. Hawkins against the Board of Control of Florida, 253 F.2nd 752, this circuit, 1958, in which that

court said that Rule 65B requires that a motion for preliminary injunction "Shall be set for hearing."

The hearing requires a trial of the issues. A trial of an issue of fact necessitates an opportunity to present evidence.

THE COURT: Let us get down to an argument of what you say constitutes the grounds for granting this relief and let's see if an evidentiary hearing is needed after we get through.

MR. STOTSENBURG: I would ask one more thing. It was my understanding that at the time the court denied the temporary restraining order it did so because it had a representation from the defendants that they would not close the transaction which we challenged, a net lease transaction, until today. And it seems to me that, therefore, I had a duty to have the evidence here. And if your Honor is inclined to deny an evidentiary hearing, I should like to have an opportunity to make an offer of proof beyond that which was made in my May 19, 1975 letter. I have tried to reduce it even more clearly.

It seemed to me from both of the comments expressed by your clerk and from an examination of the matter that your Honor's first question would be to me, and it is in almost every preliminary injunction hearing, where is

irreparable injury? Or to use the second test in the controlling case of Senesta Hotels International, where is the tipping of the hardships so strongly and unfairly against themoving party?

We believe that it is unquestionably there and we believe that both tests are met. But unless your Honor feels I should approach the matter differently, I went the other way in my brief. I talked about merits and then got to this issue. I am inclined to approach it this way I think this is what your Honor desires.

Shall I proceed?

THE COURT: Please.

MR. STOTSENBURG: As to irreparable injury, there is irreparable injury here. As the Supreme Court stated in Mills versus the Electro Autolite case in 1970, "Use of solicitation is materially misleading is itself a violation of law. As the Court of Appeals recognized in stating that injunctive relief would be available to remedy such a defect if sought prior to shareholders meeting."

You notice that both Borak and Mills, the one interesting thing here is you had plaintiff's that did make an attempt before the shareholders meeting and the court said although they were willing to treat the matter after the meeting has occurred and rescind, that it is appropriate and

even better, if you will, to get the matter before it is finished. Thatis to say, ideally before the consents have resulted, in the sense of a shareholders meeting, in the meeting.

But, of course, there is no date here. Although we have followed suit I think quite quickly and we have done so before the initial 60 day period had lapsed.

Your Honor will understand that the charges in this complaint include charges against fellow lawyers, and I do not take that matter lightly. As a consequence, I felt that --

THE COURT: Now, what do you claim was the injury to your client here if this proceeding is not stopped in its tracks?

MR. STOTSENBURG: I didn't mean to get off on that. Let me get back to the issue of irreparable injury.

Your Honor is aware that the mortgage has been extended. We do not object to that. Once the lease modification has been consummated it may be difficult, if not impossible, particularly because of the changes in the methods of calculating that income, to unscramble the eggs, to quote Judge Mansfield in the Senesta case, quoting Judge Friendly in the Electronic Specialty case, to unscramble the eggs and put the parties in the position they were in prior to the

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fraudulent transaction.

That is exactly what happened in Mills, as your Honor knows. Ultimately the decision was we cannot unscramble. Fisk may have installed capital improvements only because they are, under the new lease, permitted to expense them.

I think we have tried to point out in our brief that Fisk may expense in the amount of 100 percent totally any capital improvements, and that by so expensing those improvements, as opposed to amortizing them over the remaining life of the lease, they will wipe out monies which normally would be passed through, rent monies, to Associates; that is to say, my clients and the members of the class.

This, of course, wasn't at all shown in that letter.

THE COURT: Now, if you were to prove this on trial, aren't these defendants good for that damage?

MR. STOTSENBURG: Your Honor, I think that that may be so, that these defendants are good for it. As a matter of fact, let me jump ahead, because that points out exactly on the second test, as to relevance of hardships, that these defendants can stand, as they indicated by their willingness to wait another 90 days, they can stand to wait another 90 days to have the lease transaction consummated, versus the

situation of upholder of an interest, like my client, who needs the $40 additional every month.

I say this advisedly because I have given it a fair amount of thought. We are talking about two men who represented in 1953 that each of them had a half million dollars. Now, this is one of so many syndications that they have done, and yet they are very concerned that it might be held off for 90 days, or for a couple of months.

THE COURT: Am I correct in concluding that what we are getting down to here is $40 a month of income to your client?

MR. STOTSENBURG: No. I just wanted to meet that point because your Honor pointed out that they were good for a half million dollars each.

THE COURT: What else then? You said if this goes forward and your client doesn't get the $40 a month of the income he is presently receiving, what else doesn't happen?

MR. STOTSENBURG: Back to the issue of capital improvements. Supposing your Honor decides that in fact the informed consent of the interest holders was not given and/or in fact the solicitation could have been registered under the 1933 Act. It seems to me that we are confronted with a really difficult problem if Fisk has indeed installed capital improve-

ments. What are you going to do with them, pull them out?

You are scrambling the eggs exactly in the manner the defense has suggested they are not doing.

THE COURT: Your client doesn't have an immediate interest in the capital improvements, your client has an immediate interest in his income. The capital improvements, if that has an effect on his income, can't that be made up in damages later.

MR. STOTSENBURG: Let's take a look at how we would calculate damages because I think that is another very relevant problem. That is a problem this court has to think of in terms of what is going to be close for your Honor.

Because of the changes in the lease that are proposed to be made, and your Honor will note that we have asked for that net lease and have not seen it, it may be exceeding--and we have gotten some of the documents from the defendants--it may be exceedingly difficult to quantify in dollars the amount of damages sustained by the class.

On the other hand, to be enjoined from the transaction will impose no hardships on the defendants.

THE COURT: Yes, but you see you are saying that damages can be awarded and you are in a situation where, as I understand the opposition papers, 88 percent of the participants here have said to go ahead.

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MR. STOTSENBURG: That is what I call a clinker in terms of the defendants' arguments. I would like to show you why. If someone comes into court and says that we challenge consent here on the ground it was informed, whether it was by proxy or whatever it may be, I think it is not a defense to say most of the people have given their informed consent, because this is the issue we are raising.

As a matter of fact, the Supreme Court in the Borak and Mills cases has said that my client has a right to the informed consent of other holders of interest. Even if there is no meeting he has a right to have them informed.

If the defendants come in and say they have given their consent, it seems to me that what we are doing is putting in a chicken-egg argument and them saying they have given their consent and we saying no, they haven't.

THE COURT: Your client can be made whole in terms of dollars.

MR. STOTSENBURG: Let's go to that. Let me point out the final critical point. The new lease, for all we understand, is to be cancellable on 60 days notice. Fisk can walk away on 60 days notice.

Now, if your Honor determines that the lease transaction should be rescinded until the informed consent of the

holders is given, the possibility remains that Fisk will walk away and we will never get a damage calculation that is useable or that we can rationally get to in the sense of damages. If there are no damages, Fisk is gone.

They say they are going. They have told your Honor under oath that they are going to go. So in fact what they are really saying, they are really threatening the Court. They say you cannot issue this injunction, your Honor, because we will leave.

On the other hand, if your Honor -- so that there are damages there but you can't calculate them. On the other hand, if your Honor later rescinds it, they retain that 60 day right to walk away, and how can you calculate those damages? It is just impossible. That to me is the critical matter.

Fisk can walk away on 60 days notice, as it always has had the right during the first three years, and it is free and clear and gone.

So that the damages cannot be calculated. Hence, our necessity of appearing before this court and requesting injunctive relief. There is absolute necessity of injunctive relief of a preliminary variety to preserve the status quo, because if they exercise the 60 day term they are gone and we cannot calculate it.

There is one more point, unless your Honor desires

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to question me on that matter.

THE COURT: No. I understand where you are at.

MR. STOTSENBURG: Another point with respect to the present holders of interest, your Honor. During the period of this lawsuit they may find themselves unable to transfer their interests if the lease modification is consummated and it is later established this was a void transaction.

I think your Honor should keep that in mind because we are in a day and age when this kind of an interest of $10,000 is important to the small persons whom we represent.

I think I have touched that point and I think your Honor understands that.

Now, I think your Honor can see how our argument would relate then to the issue of tipping of a balance. We are talking about small persons with $10,000 interests. There were 650 at first; we have an understanding there is something less than 500 now.

Essentially then there are something around 500 persons who hold small $10,000 interests.

And your Honor is right in one sense. Except for the problem that will be posed for your Honor when you sit down to try to calculate damages, much less a jury, except for that problem as to irreparable injury, I think we are talking about 500 little people and the biggest real estate

operators in New York City, and they have no problem about now telling the court that they have deep pockets and they had no problem in telling the holders that they could wait another 60 or 90 days, hence the argument for irreparable injury.

If the expense is too great to bear, I want to point out to your Honor that Associates does not have the same right Fisk does. Fisk walks away and Associates holds the bag.

I think I have addressed that subject sufficiently, if your Honor will let me go on.

THE COURT: Yes, please do.

MR. STOTSENBURG: We just got one of the papers today from Mr. Abelson.

(Discussion off the record.)

MR. STOTSENBURG: There is one additional thought that I would like to add. If the new lease remains in effect you could calculate the damages, but at the point that Fisk cancels then you cannot calculate the damages. We have no indication as to when or how they might exercise their right.

Going on to the merits, first I would state to the court we just got an affidavit of Mr. Richard Abelson of the firm of Wien, Lane & Malkin. I understand they are appearing

on behalf of Associates.

I would move they be disqualified and I object to their representing Associates. Suppose at the time Mr. Abelson desires to speak or go further, your Honor may wish to treat that. I believe the same conflict which is endemic in the whole suit applies to their representing Associates here.

It is my understanding Mr. Rifkind represents all of the other defendants, and of course that would be understandable.

We move that that firm be disqualified from doing so during the pendency of this suit for the reasons that are advanced throughout the basic part of this suit. It may be your Honor would want to consider that. We didn't know who was going to represent them until the last minute.

Getting to the merits -- would your Honor prefer to reserve decision on the motion at this point?

THE COURT: I am not prepared to rule on it in any event.

MR. STOTSENBURG: There are three undenied material misstatements, and I think as we move into it it is most helpful to point out that the defendants' brief does not deny them.

THE COURT: Let me ask you this: I understand that

you have stated that it is only if you get down to the situation where if Fisk wants to pull out, that this case involves a situation where money damages does not make you whole. We don't have that situation at this point. And do we have to get to the merits?

You see, you are asking here to stop a substantial transaction, virtually completed, in midstream, where, right or wrong, informed or uninformed, the vast majority of people such as your client have said to go ahead.

Now, you may be completely right, but as far as the record before me reveals, and correct me if I'm wrong, as far as it reveals as of this moment, if you are 100 percent right money will eventually make you whole and these defendants are good for it.

Now, isn't that the end of the picture?

MR. STOTSENBURG: No.

THE COURT: Let us assume you are completely right.

MR. STOTSENBURG: First your Honor suggested this is a transaction in midstream. We do not agree fundamentally with the defendants in that regard.

THE COURT: By "midstream" I mean that the proposals are underway, people have agreed to do things, consents have been obtained, and except for your action I gather that this would be consummated somewhere in the next week or 10 days.

MR. STOTSENBURG: This is exactly what the Supreme Court instructed me as an attorney to do, and the courts as well, your Honor.

THE COURT: I know, but you are asking the District Court to give you extraordinary relief in a situation where money can make you whole. You said as of this moment it can.

MR. STOTSENBURG: Let me try it again. If we win Fisk has said it will pull out. Then you cannot calculate damages.

THE COURT: If you win this motion.

MR. STOTSENBURG: Right. Likewise, if we win by rescision they will putll out.

THE COURT: That is a further reason for not granting the motion. You can be compensated by money damages if you win the motion. Then if Fisk comes out, you cause the very thing to pass which causes the whole house of cards to come down.

MR. STOTSENBURG: Your Honor, I agree with you, that you are faced with a time when the preliminary relief -- you Honor sees it exactly correctly. The preliminary relief is necessary one way or another, and it is necessary to the plaintiff, just as the concern relates to the defendant. The preliminary relief, District Courts, Courts of Appeal,

and the Supreme Court have noted that preliminary relief may be co-extensive with the final relief granted. That is something we have to reach in terms of the Supreme Court's mandate, and I think under those circumstances I cannot help but get to the merits to try to persuade your Honor that this is not a simple case. I say this not lightly, but this is a case of fraud by attorneys.

THE COURT: I know. But still a motion for preliminary injunction on which you have to show irreparable injury or tipping of the balance in your favor.

I don't see either of them, quite frankly.

MR. STOTSENBURG: I would like under the circumstances, and I have attempted to point out facts to the court, and obviously if I am not able to persuade your Honor, you are the judge and I am the lawyer. But I think it will be helpful in your Honor sensing this and looking at it in the perspective of the Supreme Court and Judge Friendly in Studebaker against Gitlin when he says that sometimes -- I think that case is also relevant, Studebaker versus Gitlin.

THE COURT: Let's stay with our facts. You can cite me law as much as you want.

MR. STOTSENBURG: He said that irreparable injury sometimes puts more dust in the air than we expect.

THE COURT: In addition to what you have said I

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read your client's affidavit which says, "I will be irreparably injured as follows, unless this Court enters a preliminary injunction:

"A, irrevocable consent may be obtained to a scheme to defraud me and members of the class.

"B, Defendants may make transactions with innocent third parties, particularly the Seamans Bank for Savings which cannot be rescinded."

Both are compensable in dollars.

Third, "Monthly disbursements to me and other members of the class will be immediately reduced, depriving me of income of which I depend."

That, too, is compensable in dollars.

MR. STOTSENBURG: The Supreme Court answered that last point in the Goldberg decision. They did say that denial of income, slightly different but relevant in these days of inflation.

THE COURT: You are talking about $40 a month.

MR. STOTSENBURG: Hardship income to somebody. The Supreme Court said that is something that should be considered as terribly important, the right to have it immediately. It is a Supreme Court decision saying that is an important right, having it now.

THE COURT: Let me hear from the other side.

MR. STOTSENBURG: Would your Honor desire to hear anything as to the merits?

THE COURT: No, I don't believe so.

MR. RIFKIND: If it please the Court, I represent all the defendants except Associates, and I believe from the colloquy that I have heard down to this moment there is very little that I need to add. It is so obvious, it is so crystal clear that the plaintiff is unable to show irreparable injury that I don't think we need to travel any of the rest of the road.

My learned friend speaks about cases which talk about the irreparable injury out of the mere fact of paper writings of some kind. Certainly there are such cases. Two companies get merged and then it is very hard, as my learned friend has said, to unscramble that merged egg.

Here you have a situation in which everybody is before the Court. All they are going to do is sign a piece of paper. If after trial, if ever there should be a trial, this is the most trivial bunch of nonsense I have ever encountered in a courtroom. If ever there should be a trial, if the Court is persuaded that this paper should not have been signed, it can be rescinded.

If they should then exercise the power which they possess under the existing lease as well to terminate the

lease, why then terminate it. I don't understand the meaning of the words that if a lease is terminated you then forego the possibility of collecting damages during the time that the lease was in effect. That is just plain double-talk. That doesn't make any sense at all.

Of course people are subject to damage claims and to the assessment of damages regardless of whether or not they walk away. They are not going to walk into the deep Atlantic. Mr.Helmsley isn't going to leave the City of New York. Mr. Lawrence Weiner is not going to leave the City of New York. They are not going to become fugitives, if that is what my learned friend means.

This is just plain conversation that doesn't add up to a thing.

Now, your Honor, there is risk of irreparable injury but it's not the direction which my friend would have you consider it. The gravest risk of irreparable injury to the 500 or 450 participants in this venture who bought these interests in reliance of the fact that they expected Lawrence Weiner to run it for them. If my dear friend had lived in this city as long as I have, he would know that is the way those securities were sold.

The most successful man in this field that this country has produced.

To talk about conflict under those circumstances, is just plain silly, and I hate to use these words, your Honor, and I really apologize for them, but to say people regard Weiner's participation in Fisk as a conflict of interest, when the reason they put their money down was because they wanted Lawrence Weiner's promise that he would be involved in the management of this property, together with Mr. Helmsley, also a name to conjure with in the real estate world.

The gravest risk that you can expose these people to is the possibility of the risk that an injunction might be granted.

Of course, your Honor, here is a list of vacancies that have already incurred and vacancies that are threatened (handing). Somebody has to look after those.

I call your attention to page 10 of the Weiner affidavit, your Honor.

"Fisk lost $50,000 for the fiscal year ended September 30, 1974, and during the first six months of the current year lost another $115,000."

Now, this is not a philanthropic institution. This is not an eelyomosenary enterprise. How long will people continue to absorb such losses if there is no relief in the form of a sensible, intelligent, practical, pragmatic

resolution of the problem achieved by extending the mortgage, getting funds available for installation of new tenants, converting this building back to profitability so that it can continue the success which it has enjoyed during the 20-odd years that he and his father have participated in this venture, during which time, incidentally, your Honor, they have received $28,000 for the $10,000 which they still own. They haven't been so badly damaged by these conflicting interest people.

Well, if there is nohope for relief what would be the point of Messrs. Weiner and Helmsley continuing this enterprise? Of course they will give notice of termination, of course they will walk away. Then if these people start to run these buildings, they lose their tax status, which is one of the big advantages of this partnership association, so you do not pay taxes as a corporation. The minute they start to operate this building, that finishes, as the opinions of counsel will attest.

So, your Honor, I am most sincere in saying the gravest and the only jeopardy that confronts these people, whom our friend professes to represent, although 98 percent of them plus approved or acquiesced in this transaction, only 1.6 percent, I think, dissented, 1.6 percent. I don't call that a genuine representation of their interest. I think this is an adventure to do something which will be injurious

to the people whom he denominates involuntarily as the beneficiaries of his trusteeship.

As far as merits are concerned, the idea that this letter is a security is too infantile to discuss. The notion that when a corporation changes its relationship to a piece of property from ownership to leasehold, leasehold to ownership, that everytime you do that you are issuing a new security, would astonish the Securities and Exchange Commission and would make the market place an utterly chaotic situation.

THE COURT: Judge Rifkind, I didn't let your adversary get into the merits and I won't let you either.

MR. RIFKIND: There is no irreparable injury, no tipping of the handle in his favor. Everything, if he is right, is compensable in damages. It is not $40 a month, it is $29 a month.

Incidentally, that reduction is not something that he has a constitutional right to. Under the existing lease they can abandon the property. So it is zero against zero. If he has trouble proving damages, it is because he has no damages.

THE COURT: Do you want to respond very briefly?

MR. STOTSENBURG: Your Honor, I had a number of comments I was going to offer on the merits but wasn't allowed

to go into them, but Judge Rifkind did get into them.

THE COURT: He got into it because in the enthusiasm of his presentation I was not able to suggest to him that he need not.

MR. STOTSENBURG: May I file a reply brief on the merits?

THE COURT: I want to ask if you have any reply that you want to make on the question of irreparable injury?

MR. STOTSENBURG: I just wanted to answer on the subject of irrevocable consent, showing your Honor the New York law. That is the merits. If I would be permitted to file a reply brief, I will get it to your Honor very quickly. It is in draft form.

THE COURT: No. I am going to rule on this now, unless you are prepared to argue further to me.

MR. STOTSENBURG: I would like to.

We now have a lease which is cancellable on 60 days notice. I think the question should be phrased as follows: How much will be damaged if they cancel when you hold the new lease void?

I am particularly impressed by Mr. Rifkind's comment. It is very simple for Mr. Rifkind to say out of one side of his mouth that his people, his defendants, his clients are rich and wealthy and are to be conjured with.

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They are indeed.

On the other hand, I think the point is the defendants here are dealing with persons that securities laws were passed to protect. We have not gotten into those merits. We have not treated the issue by the 1933 Act at your Honor's instruction, this is an area which is fraught with fraud and merely because a learned man and an extraordinarily competent lawyer makes a good argument that we shouldn't reach it as regards proper men should not prevent us from looking at it and particularly looking for irreparable injury and balance of hardships. The balance of hardships here is that it is harder for these particular holders of the participations to make their point, to make their day with this lesser amount of money.

If you Honor would have said a bond, even in that matter we would have a problem. It is tremendous in terms of hardship.

The particular concern I want to make to your Honor is this: We have a situation here in which those who solicited consents indicated that they could wait a little longer. And yet now they come to your Honor when the matter is challenged and they say look at the consents we have.

It seems to me, your Honor, that there is irreparable injury. It seems to me that the balance tips very

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strongly. It seems to me, your Honor, that your Honor ought to reach the other elements of the Senesta test and at least permit us to present evidence.

THE COURT: All right. I am prepared to rule that on the papers before me and the arguments I have heard I do not find irreparable injury. I find that any damages that might flow from the alleged conduct are compensable in terms of dollars; that the defendants are certainly able to meet any judgment claim that might be rendered against them.

I do not find that any balance of hardships tips in favor of the plaintiff, such as is required to find in his favor on that test.

MR. STOTSENBURG: Before your Honor finalizes the order, you now having indicated to the parties, may I make an offer of proof of the evidence that would be shown so that the record would reflect such an offer?

THE COURT: I don't see any need for it. I am assuming that you have a meritorious claim for the purposes of this argument.

On the basis of the foregoing I am constrained to deny your application for preliminary injunction.

MR. STOTSENBURG: You are assuming we would succeed.

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THE COURT: I am assuming for this purpose that you will succeed on the merits. This does not reflect in any way any judgment on the merits, but merely for purposes of this argument I don't need to consider or reach that.

MR. RIFKIND: A short application, your Honor. I have been busy with responding to this motion and I have not served my answer which is due today. I would like an extension of my time to answer the complaint for, say, 10 days.

MR. STOTSENBURG: I have no objection.

THE COURT: Very good.

MR. STOTSENBURG: I would ask that counsel permit me to the extent necessary appropriately to amend the complaint if I see necessary.

MR. RIFKIND: You have a right to amend it once.

MR. STOTSENBURG: If you are making an application, and I am assuming you will, Wien, Lane & Malkin is acting as an unregistered dealer in the sale of syndications and we would like to have leave in that regard.

THE COURT: Leave will be granted.

Why don't you wait until you get the amended complaint to answer it.

MR. RIFKIND: I will wait until I get the amended complaint and then respond thereto.

THE COURT: Very good.

MR. STOTSENBURG: One more application. May I ask that the Court take note of the fact that my client, Mr. Kester, is an associate in the firm of Debevoise, Plimpton, Lyon & Gates, which firm is in no way involved in this dispute. Your Honor should have seen the postscript which I entered at the foot of my letter last week. I don't have the exact date, but your Honor I think recalls it. At that very moment Mr. Kester called me and stated that Mr. Peter Malkin of the firm of Wien, Lane & Malkin had called Mr. Plimpton, Francis Plimpton, the senior partner of that firm to discuss this case.

Now, under the circumstances when an attorney attempts to influence the relationship of an employer-employee, which is that of the Debevoise firm and Mr. Kester, I think the appearance of improprietary is rank.

I believe your Honor should immediately, and I respectfully bring it to your Honor's attention, inquire into the proprietary of Mr. Malkin's telephone call to Mr. Plimpton and if there is no other reason shown for this disgraceful act, at least in its appearance, I think this Court has a duty to face this going behind the back of a man situation.

Your Honor, I was an associate in a firm once and

I have thought occasionally about whether I had rights and whether my firm would say anything about it. I have never been so revolted as the feeling that came over me when I heard these facts. I think that this Court has a duty, and I respectfully request your Honor to look into it.

Young men who feel strongly about matters of public interest and who are lawyers ought not to be discouraged by some threat. We can see what that threat is. Therefore, I respectfully ask that your Honor set down some way, in some manner which your deems appropriate to treat this umbrage in its appearance. It may not be, but it sure as heck looks like a disgraceful act of an attorney, Mr. Malkin.

THE COURT: You want to bring this before me in papers in some appropriate way? I am not going to deal with it on what has been told to me now.

MR. STOTSENBURG: I would be glad to do so.

Your Honor, the plaintiff has instructed me to file a notice of appeal from your Honor's order just now entered. There are two ways of doing it. I would prefer an opportunity, possibly to consult with Mr. Rifkind, before we take that action. However, on the other hand, I don't want to travail on your Honor's chambers, and we have a duty under the federal rules of appellate procedure to make an application for a

stay --

MR. RIFKIND: Stay of what? Of a non-issued injunction? That is a novel procedure for me.

MR. STOTSENBURG: No, sir. I have a duty to come to your Honor and ask for commensurate relief before I go to the Court of Appeals.

I wonder if we could agree on an opportunity to discuss it for a few minutes so that I could talk to my client. Perhaps Mr. Rifkind could wait for 15 minutes and, if necessary, I can make the application for a stay and your Honor can deny it now retrospectively.

MR. RIFKIND: This is really something. Here is an application made for injunction. Your Honor denied it. Now he is going to say to grant me an injunction so I can go to the Court of Appeals.

MR. STOTSENBURG: I understand your Honor will deny it. I have a duty under the rules.

MR. RIFKIND: I will stipulate you have made the application and it has been denied.

MR. STOTSENBURG: You won't object if I file a notice of appeal?

MR. RIFKIND: If you have to appeal, you have to.

THE COURT: The application is denied.

MR. ABELSON: Your Honor, I am from the firm of

Wien, Lane & Malkin. There is an outstanding motion now for us to disqualify ourselves from representing Associates on the basis of a conflict of interest. I would certainly not leave this table without informing your Honor that we deeply oppose the motion and that we deny any conflict of interest and that we have no intention of ceasing to represent the same client that we have represented for 23 years.

I do not know whether your Honor wishes to rule on that matter at this time or not.

THE COURT: I have been presented with no facts that demonstrate a conflict to me.

MR. STOTSENBURG: Those would be covered in the same merits that related to the preliminary injunction motion, your Honor. I will be glad to reach them as part of this motion.

THE COURT: No, I am not going to do that. I will deny that motion.

MR. ABELSON: I thank you, sir.

MR. STOTSENBURG: Your Honor doesn't want to consider it more completely?

THE COURT: I read the papers and from what I have read I don't see any basis for this and therefore I don't see any need for hearing argument.

MR. ABELSON: One other thing, your Honor. You

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have granted the motion for Mr. Rifkind to extend his time to answer. I would like to make the same motion on behalf of Associates.

MR. RIFKIND: We have an understanding.

MR. STOTSENBURG: No problem in that regard.

THE COURT: Granted.

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NOTICE OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

STEVEN PAUL KESSLER, individually and as representative of a class,

Plaintiff,

-against-

LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57th STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES and WIEN, LANE & MALKIN,

Defendants.

75 Civ. 1890 (RO)

NOTICE OF MOTION

- x

S I R :

PLEASE TAKE NOTICE that, upon the affidavit of Lawrence A. Wien, sworn to May 22, 1975 and previously filed herein, the annexed affidavits of Harry B. Helmsley and Lawrence A. Wien, sworn to September 10, 1975, and of Steven B. Rosenfeld, sworn to September 12, 1975, the accompanying memorandum of law, and the prior papers and proceedings herein, the undersigned will move this Court, at a Civil Part to be held before Judge Robert Owen in Room 705, United States Courthouse at Foley Square, New York, New York, on October 10,1975 at 2:15 P. M., or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, dismissing the amended complaint in this matter in its entirety on the ground that this Court lacks subject matter jurisdiction; or, in the alternative, granting summary judgment for defendants on Count 6 of the amended complaint on the ground that defendants are entitled to judgment as a matter of law, and dismissing the remaining counts on the ground that

NOTICE OF MOTION TO DISMISS

this Court lacks subject matter jurisdiction.

PLEASE TAKE FURTHER NOTICE that any answering papers should be served upon the undersigned no later than Monday, October 6, 1975.

Dated: New York, New York
September 12,1975

Yours, etc.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
Attorneys for Defendants Wien, Lane, Linden, Silverman, Malkin, Helmsley, Schneider, Fisk Building Associates and Wien, Lane & Malkin
345 Park Avenue
New York, New York 10022

WIEN, LANE & MALKIN

By _____
Attorneys for Defendant 250 West 57th Street Associates
60 East 42nd Street
New York, New York 10017

TO:

STOTSENBURG & DONOHUE, P.C.
260 Riverside Drive
New York, New York 10025

WIEN AFFIDAVIT OF SEPTEMBER 12, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN PAUL KESSLER, individually and as representative of a class,	:	
Plaintiff	:	75 CIV. 1890
V.	:	AFFIDAVIT
LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57TH STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES, and WIEN, LANE & MALKIN,	:	
Defendants.	:	

LAWRENCE A. WIEN, being duly sworn, deposes and states, as follows:

1. Deponent is a partner in Defendant Fisk Building Associates ("FBA"), owning, together with Harry B. Helmsley, 70% of the partnership interests in FBA.

2. This affidavit is made in support of the motion of all Defendants herein to dismiss the complaint under R.12, F.R.C.P., submitted simultaneously herewith.

WIEN AFFIDAVIT OF SEPTEMBER 12, 1975

3. I have read the affidavit of Harry B. Helmsley, sworn to on September 10, 1975, submitted simultaneously herewith in support of the said motion, and I hereby affirm the statements made therein and adopt them as part of this affidavit.

WHEREFORE, I respectfully request that Defendants' motion be granted in all respects.

Lawrence A. Wien

Sworn to before me, this
10th day of September, 1975.

RICHARD ABELSON
Notary Public, State of New York
No. 60-5003750 Qualified in Westchester Co.
Cert. Filed in New York County
Commission Expires March 30, 19

WIEN AFFIDAVIT OF SEPTEMBER 12, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

STEVEN PAUL KESSLER, individually and as representative of a class,

Plaintiff,

75 Civ. 1890 (RO)

-against-

LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57th STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES and WIEN, LANE & MALKIN,

Defendants.

- -x

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Defendants having moved, in the alternative, for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, as to Count 6 of the Amended Complaint, they submit the following list of material facts as to which there is no genuine issue, in compliance with Rule 9(g) of the General Rules of this Court:

1. 250 West 57th Street Associates ("Associates") is a real estate joint venture formed on or about May 25, 1953 for the purpose of acquiring the fee title to the office building located at 250-64 West 57th Street, commonly known as the Fisk Building.

2. Fisk Building Associates ("FBA") is a partnership currently consisting of Harry B. Helmsley and Lawrence A. Wien, who together own 70% of the partnership interests, and others.

3. FBA was formed in 1953 by Harry B. Helmsley and Lawrence A. Wien, as the sole partners, to take a net lease to, and operate the business of, the Fisk Building. That lease was entered into as of September 30, 1953 between Associates as landlord and FBA as tenant. One of the provisions of the lease permitted FBA to terminate it on sixty days' written notice, without liability.

4. During 1953, the venturers in Associates offered for sale, by prospectus duly filed as part of a registration statement with the Securities and Exchange Commission (the "prospectus"), $5,000 participating units in each of the venturer's undivided interests in Associates. A total of 710 participating units, at an aggregate offering price of $3,550,000, were purchased.

5. By the prospectus, participants were advised fully and accurately of the identities of the venturers in Associates and the partners in FBA, including the fact that some of them were partners in the predecessor law firm to Wien, Lane & Malkin, which served both as counsel.

6. Neither the prospectus nor the Participating Agreements entered into by participants promised, predicted or entitled participants to any fixed return on their investments.

7. Under the Participating Agreements, the participants were given the right to share, in proportion to their respective fractional interests, in the profits and losses of Associates arising from its ownership of the Fisk Building. They were also given th right to participate in any decision to sell or mortgage the Fisk Building, to modify any existing

lease, or to make any new lease affecting the building. Each of those decisions required the consent of 75% of the participants.

8. Plaintiff's father, Sam Kessler, purchased a $10,000 participating interest in Associates in 1953. He conveyed his interest to plaintiff by written agreement in 1963.

9. Since 1953, the consent of the participants was requested for one or more of the purposes set forth in paragraph 7 hereof on approximately seven separate occasions.

10. As a result of modifications of the net lease and of the terms of the mortgage, approved by more than 75% of the participants, the annual distributions of income to participants have fluctuated.

11. Since 1953, the return on plaintiff's $10,000 interest has exceeded $28,000, not including any tax benefits he or his father may have received by virtue of their participation in Associates.

12. On April 10, 1975, Associates, by letter (the "April 10 letter") solicited consents from participants to a plan to refinance the first mortgage on the Fisk Building and to modify the terms of the net lease with FBA. The full text of the letter, and each and every disclosure made therein, is annexed as Exhibit G to the Affidavit of Lawrence A. Wien dated May 22, 1975, and is incorporated by reference herein.

13. At the time of the April 10 solicitation of consents:

(a) The depressed economy had resulted in an extremely poor office building rental market;

(b) FBA had lost $50,257 for the fiscal year ended September 30, 1974; and almost $115,000 for the first six months of the current fiscal year;

(c) In part, those losses had been the result of substantial tenant improvements at the Fisk Building made and paid for by FBA;

(d) The first mortgage loan on the Fisk Building in the sum of $2,978,905, held by the Seamen's Bank for Savings, was coming due on May 1, 1975; and

(e) FBA had resolved to terminate the Lease unless some plan could be put into effect which would allow it (i) to operate the Fisk Building without further substantial losses, and (ii) to obtain funds to defray part of the costs of tenant improvements.

14. At the time of the April 10 letter, FBA did not know the precise amount that would have to be spent on future tenant improvements which would be required in the Fisk Building or the corresponding reduction in distributions to participants.

15. The April 10 letter was mailed only to participants in Associates.

16. The April 10 letter bore on its first page the date "April 10, 1975," and a letterhead containing the address "60 East 42nd Street," the principal executive offices of Associates, and stated (p.7) "[i]t is anticipated that this letter will be mailed on April 10, 1975."

17. The April 10 letter stated (p.7) that "[a]pproval once given is irrevocable."

18. Over 75% of the participants in Associates consented to the program described in the April 10 letter.

19. FBA intended, if the program had not been approved, and still intends, if it is aborted, to exercise

its right under the lease to terminate on sixty days' written notice without further liability.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By Steven B. Rifkind (S)

Attorneys for Defendants Wien, Lane, Linden, Silverman, Malkin, Helmsley, Schneider, Fisk Building Associates and Wien, Lane & Malkin
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New York, New York 10022

WIEN, LANE & MALKIN

By Robert C. Wiedel Jr.

Attorneys for Defendant 250 West 57th Street Associates
60 East 42nd Street
New York, New York 10017

Dated: September 12, 1975

A-151

WIEN AFFIDAVIT OF SEPTEMBER 12, 1975

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DEBBE SILVERSTEIN, being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides at 98-01 67th Avenue, Forest Hills, New York 11374. That on the 12th day of September, 1975, deponent served the within Notice of Motion, Affidavits, Statement of Material Facts as to Which There is no Genuine Issue and Defendants' Memorandum of Law in Support of Motion to Dismiss the Complaint upon:

R. Alan Stotsenburg, Esq.
Stotsenburg & Donohue, P.C.
260 Riverside Drive
New York, New York 10025

by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Debbe Silverstein

Sworn to before me this
12th day of September, 1975.

Jean M. Trotta

JEAN M. TROTTA
Notary Public, State of New York
No. 41-[illegible]
Qualified in [illegible] County
Commission [illegible] March 30, 1977

ROSENFELD AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

STEVEN PAUL KESSLER, individually and as representative of a class,

Plaintiff,

-against-

LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57th STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES and WIEN, LANE & MALKIN,

Defendants.

- -x

75 Civ. 1890 (RO)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEVEN B. ROSENFELD, being duly sworn, deposes and says:

1. I am associated with Paul, Weiss, Rifkind, Wharton & Garrison, counsel to defendants Wien, Lane, Linden, Silverman, Malkin, Helmsley, Schneider, Fisk Building Associates and Wien, Lane & Malkin, in this action.

2. I submit this affidavit in support of defendants' motion to dismiss the amended complaint in this action. I am familiar with the facts herein set forth.

3. On May 23, 1975, I attended a session of this Court at which plaintiff's motion for a preliminary injunction was denied from the bench. Following the Court's ruling, plaintiff's counsel, R. Alan Stotsenburg, stated his intention to file a second amended complaint in this action and requested leave to do so. The Court granted such leave and also provided that defendants would have ten days following the filing of such

a second amended complaint within which to move or answer.

4. From May 23 until the week of July 31, neither I nor any other attorney at this firm or at Wien, Lane & Malkin, counsel for 250 West 57th Street Associates, received any legal papers or communication of any sort from Mr. Stotsenburg concerning this matter.

5. On or about July 31, 1975 Mr. Stotsenburg called Simon H. Rifkind, senior partner of our firm, and stated that he no longer intended to file a second amended complaint and that he expected to receive an answer to his first amended complaint within the next few days.

6. In the week following, additional conversations among myself, Mr. Stotsenburg and Richard H. Abelson of Wien, Lane & Malkin, resulted in the signing of a stipulation whereby (1) defendants' time to move or answer with respect to the amended complaint was extended to September 12, 1975, and (2) defendants agreed not to object on grounds of untimeliness to plaintiff's motion for determination of class action status, the time for which had expired under local Rule 11A, so long as such motion is made within thirty days after defendants serve answers in this matter.

Steven B. Rosenfeld
Steven B. Rosenfeld

Sworn to before me this
19th day of September, 1975.

Notary Public

JOHN M. TROTTA
Notary Public, State of New York
No. 41-4605726
Qualified in Queens County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN PAUL KESSLER,
individually and as representative
of a class,

Plaintiff : 75 CIV. 1890

v. : AFFIDAVIT

LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57TH STREET ASSOCIATES, PEPTER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES, and WIEN, LANE & MALKIN,

Defendants.

CITY AND STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

HARRY B. HELMSLEY, being duly sworn, deposes and states as follows:

1. Deponent is a partner in Defendant Fisk Building Associates ("FBA"), the net lessee of the office building located at 250 West 57th Street, New York, New York, commonly known (and hereinafter referred to) as the Fisk Building. This affidavit is made in support of the motion of all

Defendants herein to dismiss the complaint under R.12, F.R.C.P. submitted simultaneously herewith. Deponent is fully familiar with all of the facts and circumstances hereinafter set out, both from his own personal knowledge and from the books and records of FBA, which are under his personal supervision and control.

2. FBA is a partnership presently made up of the following individuals:

Harry B. Helmsley ("Helmsley")
Lawrence A. Wien ("Wien")
Irving Schneider
Evelyn L. Greenstein
Alvin S. Lane
Peter L. Malkin
Alvin Silverman

Helmsley and Wien, together, own 70% of the partnership interests in FBA and are now, and have been since the inception of the partnership, the two individuals primarily responsible for making the major business decisions affecting FBA.

3. FBA was formed in 1953 by Helmsley and Wien as the sole partners, to take a net lease, and operate the business of, the Fisk Building. That lease ("Lease") was entered into as of September 30, 1953 between Defendant 250 West 57th Street Associates ("Associates") as landlord, and

FBA as tenant. The operation of the Fisk Building by the partnership of Helmsley and Wien was an essential element in the offering to the public of participating units in Associates, a joint venture holding fee title to the Fisk Building. The purchases of those interests were made by the participants not only with knowledge of, but in reliance upon, the fact that Helmsley and Wien would take on the responsibility of operating the Fisk Building.

4. Paragraph "8" of the Lease has always read as follows*:

> After September 30, 1956, the tenant [FBA], upon giving sixty (60) days prior notice as provided in Paragraph "26" hereof may surrender this lease at the end of any month, in which event, the tenant shall have no personal liability for the obligations accruing after the effective date of such surrender.

The obvious purpose of Paragraph "8" is to limit the personal financial exposure of Helmsley and Wien arising from their operation of the Fisk Building. Moreover, the participants

---

* A copy of the Lease is annexed, as Exhibit "C", to the affidavit of Lawrence A. Wien, sworn to on May 22, 1975, and submitted in opposition to Plaintiff's motion for a preliminary injunction ("Wien Affidavit"). Deponent is advised that that motion was denied in all respects.

always knew that the Lease could so be cancelled on 60 days notice. The offering prospectus of July 16, 1953 furnished to participants in Associates so states at page 6*.

5. For the fiscal year ended September 30, 1974, FBA lost $50,257. And for the first 5 months of the current fiscal year, the operating loss of the building was more than $108,000.

6. The lease modification program described in the April 10, 1975 letter to participants**, relating rents more closely to the building's operations, was proposed to avoid cancellation of the Lease by FBA. The allegation of Plaintiff that FBA did not intend to cancel the Lease under any circumstances is absurd on its face. Deponent unequivocally states that if this program had been rejected, FBA would have exercised its right to cancel the Lease, just as it would have to if that ongoing program were now nullified. As Lawrence A. Wien stated in his May 22nd affidavit (at pg. 15): "It is not a matter of intention; it is a matter of necessity".

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* Exhibit "B", Wien Affidavit
** Exhibit "G", Wien Affidavit

HELMSLEY AFFIDAVIT

WHEREFORE, Deponent respectfully prays that Defendants' motion be granted in all respects.

Harry B. Helmsley

Sworn to before me, this
10th day of September, 1975.

Nélida Alicia Sapot

NELIDA ALICIA SAPOT
Notary Public State of New York
No. 41-4518606
Qualified in Queens County
Commission Expires March 30, 1976

NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT AND CLASS CERTIFICATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN P. KESSLER,
individually and as
representative of a class,

Plaintiff

v.

LAWRENCE A. WIEN, et al.,

Defendants

---

75 Civ. 1890 (RO)

Notice of Cross-Motion

Please take notice that the undersigned will move the Court at such time and place as shall be determined by the Court, in opposition to defendants' motions to dismiss the complaint or, alternatively, for summary judgment in defendants' favor on Count 6; and for the following orders:

1. Summary judgment in plaintiff's favor on the issue of liability in Count 1; and

2. Certification of the action as a class action.

These motions will be based upon the attached affidavit of Steven P. Kessler, sworn November 10, 1975, and a memorandum of law, and statements of material facts which are in dispute and are not in dispute.

November 10, 1975

Respectfully submitted,
STOTSENBURG & DONOHUE, P.C.

By _____

ATTORNEYS FOR PLAINTIFF

122 East 42nd Street
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN P. KESSLER,
individually and as
representative of a class,

Plaintiff

v.

LAWRENCE A. WIEN, et al.,

Defendants

---

75 Civ. 1890 (RO)

Affidavit

State of New York,
New York County, ss.:

STEVEN P. KESSLER, being sworn, states:

1. I am the plaintiff in this action. I make this affidavit in opposition to motions by defendants to dismiss the amended complaint or, alternatively, to grant summary judgment in defendant's favor on Count 6. I also make this affidavit in support of plaintiff's cross-motions for summary judgment on Count 1 and certification of the action as a class action.

2. Upon my marriage on June 22, 1963, my father, Samuel Kessler, gave me $10,000 in participating interests ("Interests") in 250 West 57th Street Associates ("Associates"), and I continue to hold such Interests.

3. Prior to my receipt of a letter dated April 10, 1975 on the letterhead of Wien, Lane & Malkin, Counsellors

at Law, soliciting my consent to a mortgage refinancing and a modification of the net lease of Associates (the "April 10 letter"), I had been receiving a check in the amount of $95.83 a month as my investment return on these Interests. I also received a $95.83 check in May 1975. Beginning in June 1975 and for the months of July, August, September and October, 1975, I received a monthly check of $66.66 as my investment return on these Interests.

4. Attached as exhibit A is a letter dated October 16, 1975 on the letterhead of Wien, Lane & Malkin, signed by Lawrence A. Wien, which I received on or about October 18, 1975.

5. Since the date of the October 16, 1975 letter, I have received no checks from Associates.

Steven P. Kessler

Sworn to before me on
November 10, 1975

R. ALAN STOTSENBURG
Notary Public, State of New York
No. 31-4519977
Qualified in New York County
Commission Expires March 30, 1976

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EXHIBIT A TO KESSLER AFFIDAVIT

DONALD A. BETTEX
MARTIN D. COWAN
RALPH W. FELSTEN
MELVYN H. HALPER
STANLEY KATZMAN
ALVIN B. LANE
FRED LINDEN
WILLIAM JAY LIPPMAN
JOHN L. LOEHR
ROBERT A. MACHLEDER
PETER L. MALKIN
MARTIN D. NEWMAN
ALVIN SILVERMAN
C. MICHAEL SPERO
ROBERT I. WEISSMANN
LAWRENCE A. WIEN

WIEN, LANE & MALKIN
COUNSELLORS AT LAW

LINCOLN BUILDING
60 EAST 42ND STREET
NEW YORK, NEW YORK 10017

TELEPHONE (212) 687-8700 • CABLE LAWWIEN

RICHARD H. ARELSON
JEFFREY R. GALLIN
ALAN D. GORDON
MITCHELL J. NELSON
STEPHEN [illegible]
RICHARD A. SHAPIRO
ALBERT J. WILSON

October 16, 1975

TO THE PARTICIPANTS IN 250 WEST 57TH ST. ASSOCIATES:

On April 10, 1975 I wrote you that the lessee's operating loss for the first five months of the current fiscal year, which began October 1, 1974, was almost $109,000, and that the loss was likely to increase, at least through 1976. I recommended a lease modification which was subsequently approved by the participants.

The modified lease became effective as of May 1, 1975. It provides for

a) A basic rent at the annual rate of $342,280, to cover the required mortgage charges and supervisory fees and disbursements.

b) A primary overage rent equal to the first $414,000 per annum of net operating profit, above the basic rent.

c) A secondary overage rent equal to 50% of the net operating profit after the payment of basic rent and primary overage rent.

My letter of April 10, 1975 contained the following statement, which was incorporated into the modified lease: "Commencing May 1, 1975 the lessee will pay advances against the primary overage rent at the rate of $288,000 a year (8% on $3,600,000). After the operating results for the fiscal year ending September 30, 1975 are available, advances against primary overage rent will be adjusted to reflect the actual net operating profit of the property for the period May 1, 1975 through September 30, 1975."

(over)

EXHIBIT A

WIEN, LANE & MALKIN

October 16, 1975

The operating results have now been received. The enclosed statement discloses the operating loss of the lessee for the period May 1, 1975 through September 30, 1975, as well as the operating loss for the full fiscal year from October 1, 1974 through September 30, 1975. As indicated, the profit for the five months from May 1 through September 30, 1975 was $27,763, before the advances of $120,000 against additional rent. The lessee is entitled to recoup $92,237 of excess advances against additional rent, before further distributions can be made.

As a result, monthly distributions will be suspended until the lessee has recouped the described $92,237. Although the lease provides for an annual adjustment of distributions, I will send to you a summary of operating results at the end of the first six months of the current fiscal year which began on October 1, 1975. I hope that by that time, the excess distributions will have been recouped by the lessee, and we can renew monthly distributions, without waiting until the end of the new fiscal year.

I deeply regret this development. It has been caused by generally depressed economic conditions, and the particular problems of New York City and the Manhattan office building rental market.

You will be advised of any significant developments which may arise. If you have any question about this situation, please communicate with either of my partners, William Jay Lippman or Peter L. Malkin.

Cordially yours,

LAWRENCE A. WIEN

LAW:c
encl.

P.S.: The enclosed copy of an article in THE NEW YORK TIMES will give you some idea of the problems of commercial real estate in New York City today.

LAW:c
encl.

EXHIBIT A TO KESSLER AFFIDAVIT

Fisk Building Associates
Statement of Income and Expense

	Oct. 1, 1974 through Sept. 30, 1975	Oct. 1, 1974 through April 30, 1975	May 1, 1975 through Sept. 30, 1975
Income:			
Rent income	$2,032,183	$1,196,032	$836,151
Escalation rent income	313,709	231,157	82,552
Lease cancellation income	10,056	10,056	-
Other income	4,426	2,446	1,980
Electricity, net	(2,491)	31,986	(34,477)
Total income	2,357,883	1,471,677	886,206
Expenses:			
Labor costs	677,969	378,791	299,178
Real estate tax	660,825	378,360	282,465
Repairs and supplies	185,126	145,653	39,473
Management and leasing	90,000	52,500	37,500
Fuel oil	89,485	83,541	5,944
Professional fees	43,414	16,534	26,880
Security	20,019	11,004	9,015
Rubbish removal	14,355	8,036	6,319
Water, net	14,082	15,391	(1,309)
Insurance	9,845	5,600	4,245
Interest	12,009	7,428	4,581
Telephone	4,851	2,738	2,113
Advertising	2,857	1,879	978
Miscellaneous	2,892	2,331	561
Total expenses before rent	1,827,729	1,109,786	717,943
Net income before rent expense	530,154	361,891	168,263
Less, Basic rent expense	566,333	425,833	140,500
Net income (loss) before advances against additional rent	(36,179)	(63,942)	27,763
Less, Advances against additional rent	120,000	-	120,000
Net loss	$ (156,179)	$ (63,942)	$(92,237)

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ROSENFELD LETTER

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 PARK AVENUE
NEW YORK, N.Y. 10022
TELEPHONE (212) 644-8000
TELECOPIER (212) 644-8202
CABLE LONGSIGHT N.Y.
TELEX 12-7831

RANDOLPH E. PAUL (1946-1956)
LOUIS S. WEISS (1927-1950)

JOHN F. WHARTON
LLOYD K. GARRISON
ROBERT E. SAMUELS
COUNSEL

SIMON H. RIFKIND
HOWARD A. SEITZ
ADRIAN W. DEWIND
MORRIS B. ABRAM
MORDECAI ROCHLIN
PAUL J. NEWLON
JOSEPH S. ISEMAN
JAMES B. LEWIS
THEODORE C. SORENSEN
MARTIN KLEINBARD
RICHARD M. PAUL
NORMAN ZELENKO
JOHN E. MASSENGALE
JAY H. TOPRIS
EDWARD N. COSTIKYAN
ROBERT H. MONTGOMERY, JR.
JOHN C. TAYLOR, 3RD
BERNARD H. GREENE
ERNEST RUDENSTEIN
ALLAN B. ECKER
STUART ROBINOWITZ
JAMES L. PURCELL
ARTHUR KALISH
DAVID T. WASHBURN
BERNARD FINKELSTEIN
ARTHUR L. LIMAN
SEYMOUR HERTZ
WALTER F. LEINHARDT
GERALD D. STERN
ANTHONY B. KURLIN
MARTIN LONDON
DAVID C. BRODHEAD
PETER R. HAJE
LEONARD V. QUIGLEY
ALLAN BLUMSTEIN
NEALE M. ALBERT
JAY GREENFIELD
KEVIN J. O'BRIEN
ALFRED D. YOUNGWOOD
DONALD F. MOORE
JOSEPH E. BROWDY
SIDNEY S. ROSDEITCHER
ROBERT L. LAUFER
ALLEN L. THOMAS
PETER L. FELCHER
MARK H. ALCOTT
JOHN P. MCENROE
PETER J. ROTHENBERG
DANIEL P. LEVITT *
JUDITH R. THOYER

* MEMBER D.C. BAR ONLY

WRITER'S DIRECT DIAL NUMBER
(212) 644-8186

November 11, 1975

U.S. DISTRICT COURT
FILED
JAN 13 1977
S.D. OF N.Y.

Honorable Richard Owen
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Kessler v. Wien
75 Civ. 1890 (RO)

Dear Judge Owen:

This will confirm my telephone conversation today with Ms. Celedonia, your law clerk, concerning the pending motions in the above-entitled action.

Defendants' motion to dismiss and for summary judgment, originally noticed for October 10, 1975, had been successively adjourned to November 14, 1975, to give plaintiff opportunity to submit answering papers. Although we had stipulated that plaintiff's answering papers would be due five days before the return date, those papers were only received in our office this morning. Accordingly, we have arranged, upon consent of all parties, to a further adjournment of defendants' motion to November 21, 1975, to permit the filing of reply papers.

Along with his opposition to defendants' motion, plaintiff filed a cross-motion for summary judgment on Count I of the complaint, and a motion for certification of the action as a class action. While it is fully appropriate to consider plaintiff's cross-motion with respect to Count I along with the defendants' pending motions, it is, in our judgment, burdensome to require defendants to prepare and file opposition to the class action motion while a motion to dismiss for lack of subject matter jurisdiction is pending. We do not take the class action motion lightly, and would anticipate conducting discovery and filing a substantial memorandum in opposition thereto.

(28)

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

That would be an unnecessary waste of time and expense should Your Honor grant the motion to dismiss for lack of subject matter jurisdiction. Accordingly, we respectfully request that the class action motion be held in abeyance pending determination of defendants' motion to dismiss.

I have discussed the foregoing with R. Alan Stotsenburg, plaintiff's counsel. He asked me to convey to Your Honor that, while he does not agree with our point of view and is prepared to produce his client immediately for a deposition on the class action question, he has no objection to deferring the class action motion pursuant to our request, if Your Honor is so inclined.

I conveyed all of the foregoing to Ms. Celedonia, and she requested that I make the application in a letter to Your Honor. We would therefore appreciate knowing as soon as possible whether the class action motion is to be deferred.

Thank you for your consideration.

Respectfully yours,

Steven B. Rosenfeld

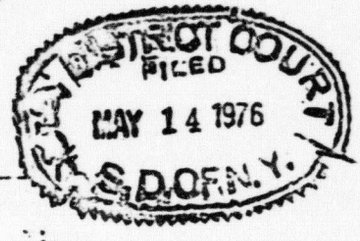
SBR:jmt

Steven B. Rosenfeld

cc: R. Alan Stotsenburg, Esq.
Stephen Schlakman, Esq.
Wien, Lane & Malkin

A-167

OPINION OF MAY 13, 1976



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN PAUL KESSLER, individually and as representative of a class,

Plaintiff,

-against-

LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57TH STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES and WIEN, LANE & MALKIN,

Defendants.

---

75 Civ. 1890

MEMORANDUM AND ORDER

~~4444~~

4412

OWEN, District Judge

This action is based on a letter sent by defendant Lawrence Wien to participants in 250 West 57th Street Associates ("Associates") soliciting their consents to modifications in the lease and mortgage of an office building to which the Associates, as a joint venture group, held title. Plaintiff Steven Kessler, a participant in Associates, contends that this letter offended the registration, fraud and proxy provisions of the Federal securities laws, the corresponding State law provisions, and constituted common law fraud and a violation of a fiduciary duty. Defendants Lawrence Wien, et al., have moved in advance of

discovery for dismissal or, in the alternative, for summary judgment, and plaintiff has cross-moved for summary judgment on count 1.

In May of 1953, ten men, including defendants Wien, Alvin Lane, Harry Helmsley and Irving Schneider, covenanted to create a joint venture with the stated purpose of purchasing the Fisk Building and leasing it to defendants Wien and Helmsley, partners doing business under the name of "Fisk Building Associates" ("FBA"). It was agreed that the property would not be sold, mortgaged or transferred or the lease modified without approval of the owners of 3/4 of the property. Under the terms of the covenant, each of the ten associates owned an undivided 10% interest in the property to be acquired, and shared equally in profits and losses. It was further provided that the law firm of Wien, Lane, Klein & Purcell, largely if not entirely staffed by Associates, would be paid an annual retainer for legal services. Thus, as originally conceived, the lessor, the lessee, and the law firm of both, were largely composed of the same people.

In July of 1953, Associates offered by prospectus duly filed as part of a registration statement with the Securities and Exchange Commission,

$5,000 participating units in the interests of the various venturers ,a total of 710 participating units at an aggregate offering price of $3,550,000. Under the participating agreement, each of the original ten venturers acted as an agent for those parties who purchased a portion of their interests, sharing the profits and losses proportionately. Before agreeing to a change in the lease or mortgage of the property, they had to obtain the consent of the owners of at least 3/4 of the property for which they were the agent. Plaintiff's involvement stems from the purchase by his father of a $10,000 participating interest which was subsequently transferred to him.

In September of 1953, Associates, as contemplated in the original covenant, entered into an agreement to lease the Fisk Building to FBA. The lease set a basic rent rate to apply until October 1978, and provided an additional rent payment of 50% of any annual profits above $100,000. Under the lease, FBA could terminate its tenancy at any time after September 30, 1956 upon giving 60 days notice. The original lease was subsequently modified on a number of occasions upon receipt of the required consents.

In April 1975, defendant Wien, under the

letterhead of Wien, Lane & Malkin, sent a letter to participants in Associates soliciting their consents to a program which involved an increase in the first mortgage and a modification of the rental provisions of the lease. Under the proposal, the basic rent would be reduced from $730,000 to $342,280 -- the amount required to pay the mortgage charge and the annual legal retainer -- while the basic overage rent would be increased from 50% of any annual profit over $100,000 to the first $414,000 per annum of net operating profit, and a secondary overage rent would be imposed of 50% of any further profit. The letter also proposed that the principal amount of the mortgage be increased and its term extended.

Plaintiff rests federal jurisdiction on his claims that the Wien letter violated the registration, antifraud and proxy provisions of the Federal securities laws. He concedes that the first two claims are based upon the premise that the Wien letter was part of the offering of a "security" within the meaning of 15 U.S.C. 77b(1). See 15 U.S.C. §77e(a), 15 U.S.C. 77q. It is this premise which defendants attack.

Plaintiff has advanced two theories to satisfy the "securities" requirement. First, he contends that

the Wien letter proposed such a drastic change in the terms of the existing security that it was, in effect, an offer of a new security. The basis for this argument is his contention that the Wien letter proposed to change the interest terms from an assured 11.5% return to a contingent formula which was unlikely, in practical terms, to yield any return.

The threshold and insuperable difficulty with plaintiff's argument is that the existing security agreement does not, as plaintiff asserts, promise participants an assured return of 11.5%, or indeed any guaranteed return.[1] The participating agreement specifies only that "all profits and losses arising from the ownership of the Property shall be shared by the parties in proportion to their respective fractional interests." And it specifically contemplates the possibility of modification in the lease, subject to the consent of the owners of 3/4 of the participating interests.

Unable to point to anything in the participating agreement itself which promises a guaranteed return,

---

[1] By way of contrast, in the case of Allied-Carson Corp., CCH Fed. Sec. L. Rep. ¶80,434 (SEC Ruling, 1976), the debentures in question had a fixed term and rate of interest -- both of which the company proposed to change.

plaintiff makes allusion to the prospectus. But this document also emphasizes that participants will share proportionately in all profits and losses. The closest it comes to even hinting at a guaranteed return is a tabulated projection of "Net Profit Allocable to Joint Venturers for Federal Income Tax Purposes." But this figure, stated in terms of an annual profit figure rather than a percentage return on investment, and calculated only for the first five years of the lease -- from 1953 until 1958 -- is specifically titled a "projected statement." And underneath the tabulation of figures the prospectus states that "(t)he rent income set forth above is based upon the minimum annual net rent provided for under the net lease with FBA, and assumes that such net profits will continue after the three year period during which the lease is non-cancellable." And lest any credulous investor should still place undue reliance upon the projection, the prospectus warns that:

> The foregoing analysis is not intended as a representation as to the actual net operating revenue of FBA in the future. It is based upon current rentals (there having been virtually 100% occupancy since 1949) and expense items which might not continue unchanged over the term of the net lease.

Rather than being indelibly etched in the original participant's agreement as suggested by plaintiff, the

11.5% rate of return was the product of subsequent changes in the mortgage, made upon approval by participants in response to changing economic conditions. And beyond this ill-founded argument about the rate of return, plaintiff has suggested no way in which the Wien letter proposed to change the terms of the participating agreement. Although the 1975 Wien letter proposes a more drastic change in the lease, it bears a familial resemblance to the previous modifications, and like them is of a type contemplated by the original agreement. The fact that plaintiff did not like the 1975 proposal is not sufficient to transfer it into the offering of a new security.[2]

Plaintiff's second theory is that the lease itself between Associates and FBA is a security, and consequently the proposed change in the terms of the lease constituted the offering of a new security. In support

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[2] Plaintiff's claim that the case of Kopet v. Esquire Realty Co., CCH Fed. Sec. L. Rep. ¶94,312 (S.D.N.Y. 1973) is "almost on all fours with this one" overlooks fundamental differences. In Kopet, limited partners in a real estate venture were offered the opportunity to participate in the refinancing of a mortgage by purchasing additional interests. It was conceded that the additional interests were securities. By way of contrast in this case, no additional interests have been offered for sale, and the proposed action is to be taken by the joint venturers as an entity rather than by any individual investor.

of this argument, plaintiff cites SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943) and SEC v. How ey Co., 328 U.S. 293 (1946). In Joiner, the court held that leases on oil wells, when sold to individual purchasers as an opportunity to participate in a speculative enterprise, were "securities" within the meaning of the Securities Act. Similarly, in How ey, the court held that strips of citrus acreage, offered for sale to individual customers as part of an "opportunity to contribute money and to share in the profits of a large citrus fruit enterprise," were securities. 328 U.S. at 299.

Both of these cases are factually distinguishable from this one in terms of the property interests involved.[3] More importantly, the offering in each case was, in effect, a proposal to individuals previously uninvolved to engage in a speculative enterprise. The analogous transaction here, the original participating agreement, was properly registered with the SEC. By way of contrast, the proposed lease modification cannot be similarly construed as an offering to engage in a new scheme of speculation. The persons to whom it was

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[3] In Joiner the purchasers were lessees rather than lessors, and in How ey the designated security was ostensibly a fee simple rather than a lease.

addressed had already opted to participate in Associates. And their rights are defined in the participating agreement rather than the lease to which they are not, at least directly, parties.

The focus of the Securities Acts is upon "the need for regulation to prevent fraud and to protect the interests of investors." United Housing Fund Inc. v. Furman, 421 U.S. 837, 849(1975). In cases like Joiner or How ey, where the plaintiff is an individual purchaser, the question is whether the securities laws offer any protection. But here, where plaintiff is involved as a participant in a larger entity, he is protected by the registration of the underlying participating agreement and, with respect to proposed lease modifications, by the proxy rules. To require in addition that all leases entered into, and each subsequent modification of any significance, be separately registered would be to add greatly to the costs and difficulties of corporate business without any corresponding benefit to individual investors. It is a step which -- especially in the absence of any precedent -- I decline to take. Accordingly, I conclude that the Wien letter was not the offer of a "security" within the meaning of the Securities Act, 15 U.S.C. §77b(1), and that consequently I must dismiss counts 1 and 2.

Plaintiff also rests federal jurisdiction on his claim in count 6 that the Wien letter violated the rules governing the obtaining of proxies and consents. In support of this claim, he enumerates seven alleged omissions, one alleged misstatement, one alleged misrepresentation, and three other alleged violations of SEC rules. Although impressive in their number, these alleged violations are distinctly less imposing in substance. The common idea underlying most of them is that the letter fails to make a sufficiently explicit disclosure of the potential conflicts of interest stemming from the overlapping membership of FBA, Associates and the Wien law firm. Defendants respond that the securities laws only require disclosure of the underlying facts, and that those facts are spelled out in both the original prospectus and the Wien letter.

Plaintiff contends that it was incumbent upon Wien to disclose that there was a "fundamental conflict of interest" involved in the position of the Wien law firm, and that the proposed modification of the lease rental is for the benefit of FBA and to the detriment of Associates. In effect, plaintiff demands that the Wien letter condemn the proposal it is offering. But "(m)anagement need not present the contentions of both sides so long as it supplies its stockholders with all

the facts material to an independent decision on the merits of the proposed transaction." Abramson v. Nytronics, Inc., 312 F. Supp. 519, 526 (S.D.N.Y. 1970). The relevant question is whether the underlying facts here have been sufficiently disclosed.

Under 14a-9 the standard is whether the solicitation contains a statement "which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading . . . ." Typically, in a proxy case the principal issue is whether the omission or misstatement involves a material fact. Here, the subject of the alleged omissions is clearly material. The question is whether in light of the facts admittedly disclosed, there were any actual omissions.

Defendants argue that they freely disclosed their respective roles. And they point to substantial disclosure in the original prospectus, and the further information supplied in the letter itself. Nonetheless, drawing all inferences in favor of plaintiff, as I must on this motion, Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317 (2d Cir. 1975), I cannot conclude on this state of the record that summary judgment is appropriate.

Although plaintiff has not offered any significant support for his allegations, the Second Circuit rule in this type of case -- where the facts are largely in the possession of the defendant -- is that plaintiff should at least have the opportunity for discovery before a summary judgment motion is granted. Schoenbaum v. Firstbrook, 405 F.2d 215, 218 (2d Cir. en banc 1968), cert. denied sub nom Manley v. Schoenbaum, 395 U.S. 906 (1969). Accordingly, defendants' motion for summary judgment on count 6 is denied.

Defendants argue that the state law counts should be dismissed because there is no federal basis for jurisdiction. In view of my decision on count 6, this argument is inapplicable, and consequently, I decline to dismiss the other counts.

Accordingly, defendants' motion is granted with respect to counts 1 and 2, and denied with respect to all other counts.

Plaintiff's motion for summary judgment on count 1 is denied.

So Ordered.

May 13, 1976.

Richard Owen
United States District Judge

NOTICE OF MOTION FOR CLASS ACTION CERTIFICATION

FILED
MAY 20 1976
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN P. KESSLER,
individually and as
representative of a class,

Plaintiff

v.

LAWRENCE A. WIEN, et al.,

Defendants

75 Civ. 1890 (RO)

Notice of Motion
for Class Action
Certification

Please take notice that the undersigned will move the Court, Honorable Richard Owen presiding, at the United States Courthouse, Foley Square, Room 301, on Thursday, June 10, 1976, at 2:15 p.m. or as soon thereafter as counsel may be heard, for an order certifying the action as a class action with respect to counts 3 through 7 of the complaint.

The motion will be based on plaintiff's motion for class certification dated November 10, 1975, and all the pleadings and papers filed in the action.

Dated: May 18, 1976
New York, New York

STOTSENBURG & DONOHUE, P.C.

by _____

4401 Chanin Building
122 East 42nd Street
New York, N.Y. 10017
212/986-2500

ATTORNEYS FOR PLAINTIFF

TO: Paul, Weiss, Rifkind.
Wharton & Garrison

Wien, Lane & Malkin

ATTORNEYS FOR
DEFENDANTS

20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN PAUL KESSLER, individually and as representative of a class,	:	
Plaintiff,	:	75 Civ. 1890 (RO)
-against-	:	
LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57th STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES and WIEN, LANE & MALKIN,	:	ANSWER TO AMENDED COMPLAINT
Defendants.	:	

Defendant 250 West 57th Street Associates, for its answer to the amended complaint:

1. Denies the averments of paragraph 1, except that plaintiff claims jurisdiction under the statutes and principles referred to therein.

2. Denies the averments of paragraphs 2 and 3.

3. Denies the averments of paragraph 5 pertaining to the class, except that plaintiff purports to bring this action on behalf of the described class.

4. With respect to paragraph 6, denies the averment of subparagraph (a) pertaining to the class, the parenthetical averment of subparagraph (c)(i) and the averment of subparagraph (c)(iii).

5. Denies the averment of paragraph 7 that defendant Fred Linden is a partner in defendant Fisk Building Associates.

6. Denies the averment implicit in paragraph 8 that this action may be maintained as a class action pursuant to Rule 23.

ANSWER OF 250 WEST 57th STREET ASSOCIATES

7. Denies the averments of paragraph 9.

8. Denies the averments of paragraph 10, except that on or about April 10, 1975, a letter dated April 10, 1975 and signed by defendant Lawrence Wien on the letterhead of defendant Law Firm was mailed to all participants in this defendant.

9. Denies the averments of paragraph 17 and 18 insofar as they are incorporated by reference in paragraphs 24, 27 and 32.

10. Denies the averments of paragraphs 21, 22, 23, 25, 26, 28, 29, 30 and 32 through 38.

WHEREFORE, defendant 250 West 57th Street Associates demands judgment dismissing the complaint, together with the costs and disbursements of the action.

June 3, 1976

WIEN, LANE & MALKIN

By _____
A Member of the Firm

Attorneys for Defendant
250 West 57th Street Associates
60 East 42nd Street
New York, New York 10017
(212) 687-8700

ANSWER OF OTHER DEFENDANTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

STEVEN PAUL KESSLER, individually and as representative of a class,

Plaintiff,

-against-

LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, 250 WEST 57th STREET ASSOCIATES, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES and WIEN, LANE & MALKIN,

Defendants.

- -x

75 Civ. 1890 (RO)

ANSWER

Defendants LAWRENCE A. WIEN, ALVIN S. LANE, FRED LINDEN, ALVIN SILVERMAN, PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, FISK BUILDING ASSOCIATES and WIEN, LANE & MALKIN (hereinafter referred to collectively as "the answering defendants") by their attorneys Paul, Weiss, Rifkind, Wharton & Garrison, answering the Amended Complaint herein:

1. Deny the allegations of paragraph 1, except admit that plaintiff purports to found jurisdiction on the statutes and principles cited.

2. Deny the allegations of paragraphs 2 and 3.

3. Admit the allegations of paragraph 4.

4. Deny the allegations of paragraph 5, except admit that plaintiff purports to bring this action on behalf of the class described.

5. Deny the allegations of paragraph 6, except admit that defendant 250 West 57th Street Associates ("Associates") is a joint venture which owns the Fisk Building, that defendant Fisk Building Associates ("FBA") is a partnership, that there exists a net lease of the Fisk Building from Associates to

FBA, to which defendants refer for all the terms and conditions thereof, and that defendant Wien, Lane & Malkin ("Law Firm") is a partnership engaged in the practice of law with offices at 60 East 42nd Street, New York, New York.

6. Admit the allegations of paragraph 7, except deny that defendant Fred Linden is a partner in defendant Fisk Building Associates.

7. Deny the allegation implicit in paragraph 8 that this action may be maintained as a class action pursuant to Rule 23, Fed. R. Civ. P.

8. Deny the allegations of paragraph 9.

9. Deny the allegations of paragraph 10, except admit that on or about April 10, 1975, a letter dated April 10, 1975 and signed by defendant Lawrence Wien on the letterhead of Law Firm was mailed to all participants in Associates.

10. State that Counts 1 and 2 of the Amended Complaint have been dismissed by this Court, and that therefore no response to paragraphs 11 through 16, 19 or 20 is required.

11. Deny the allegations of paragraphs 17 and 18 insofar as they are incorporated by reference in paragraphs 24, 27 and 32.

12. Deny the allegations of paragraph 21, and assert that defendants have made all filings required by the statutes cited therein.

13. Deny the allegations of paragraphs 22 through 30.

14. Admit the allegations of paragraph 31.

15. Deny the allegations of paragraphs 32 through 38.

16. State that paragraphs 39 through 41 constitute a prayer for relief to which no response is required.

FIRST AFFIRMATIVE DEFENSE

17. This Court lacks jurisdiction over the subject matter of this action.

ANSWER OF OTHER DEFENDANTS

SECOND AFFIRMATIVE DEFENSE

18. The complaint fails to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

19. This Court lacks jurisdiction over Counts 3, 4, 5 and 7 of the complaint under the principles of pendent jurisdiction.

FOURTH AFFIRMATIVE DEFENSE

20. The complaint fails to state a claim upon which relief can be granted against defendants Linden, Malkin, Helmsley, Schneider, Fisk Building Associates and Wien, Lane & Malkin who are not alleged to be joint venturers in Associates.

WHEREFORE, the answering defendants demand judgment dismissing the complaint against them and awarding them the costs and disbursements of this action, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 3, 1976

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By Ronald W. Meister
Ronald W. Meister

Attorneys for Defendants Wien, Lane, Linden, Silverman, Malkin, Helmsley, Schneider, Fisk Building Associates and Wien, Lane & Malkin
345 Park Avenue
New York, New York 10022
(212) 644-8000

OWEN, J.

A-185

OPINION AND ORDER APPEALED FROM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. FILED
NOV 16 1976
S. D. OF N.Y.

STEVEN P. KESSLER, individually and as representative of a class,

Plaintiff

-against-

LAWRENCE A. WIEN, et al.,

Defendants.

75 Civ. 1890

MEMORANDUM AND ORDER

OWEN, District Judge

On the remaining claim in his complaint,[1] plaintiff now moves for class action certification. Defendants oppose the motion arguing that plaintiff has failed to meet two of the necessary requirements for class certification -- typicality and adequacy of representation.[2] I find that plaintiff has failed to satisfy Rule 23, and his motion must, therefore, be denied.

As one of the elements of adequacy of representation, plaintiff must demonstrate that his interests are

[1] Counts One and Two of plaintiff's complaint were dismissed in this Court's memorandum and order dated May 13, 1976.

[2] Fed. R. Civ. P. 23(a)(3)(4).

MICROFILM
NOV 17 1976

coextensive and consistent with the members of the proposed class. Korn v. Franchard Corporation, 456 F.2d 1206, 1212 (2d Cir. 1972); Free World Foreign Cars, Inc. v. Alfa Romeo, S.p.A., 55 F.R.D. 26 (S.D.N.Y. 1972). See Green v. Wolf Corporation, 406 F.2d 291, 298 (2d Cir. 1968). Defendants point to the fact that approximately 88% of the proposed class have given their approval to the April 10, 1975 proposal, the very proposal upon which plaintiff bases his SEC proxy rule violation. Where such a percentage of the potential class members have so voiced their disagreement with plaintiff's course of action, if allowed to represent the class, plaintiff would be in a position to overturn the will of the vast majority. This conflict of interest prevents plaintiff from adequately representing the proposed class. duPont v. Perot, 59 F.R.D. 404 (S.D.N.Y. 1973).

For the foregoing reasons, plaintiff's motion for class action certification is denied.

So Ordered.

November 10, 1976.

United States District Judge

NOTICE OF APPEAL

FILED
U.S. DISTRICT COURT
DEC 10 12 23 AM '76
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN P. KESSLER,
individually and as
representative of a class,

Plaintiff

v.

LAWRENCE A. WIEN, et al.,

Defendants

75 Civ. 1890 (RO)

NOTICE OF APPEAL

Plaintiff Steven P. Kessler appeals to the United States Court of Appeals for the Second Circuit from the order entered November 16, 1976 in this action by Honorable Richard Owen, United States District Judge, denying plaintiff's motion for class action certification pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Dated: New York, New York
December 10, 1976

STOTSENBURG & DONOHUE, P.C.

By _____
R. Alan Stotsenburg

4401 Chanin Building
122 East 42nd Street
New York, New York 10017
212/986-2500

ATTORNEYS FOR PLAINTIFF-APPELLANT

TO: CLERK, Southern District of New York

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
WIEN, LANE & MALKIN
ATTORNEYS FOR DEFENDANTS

ISSUED
CTD 1
4L DAY 12/10/76

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

THEODORE RICHMAN, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1361 EAST 88 BROOKLYN. N.Y.

That on the 1ST day of APRIL, 1977, deponent personally served the within JOINT APPENDIX

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true copies of same with a duly authorized person at their designated office.

~~By depositing~~ _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 PARK AVE
NEW YORK N.Y. 10022
ATTORNEYS FOR APPELLEES (EXCEPT 250 W. 57'ST ASSOC)

WIEN, LANE & MALKIN
60 EAST 42ND ST.
NEW YORK, N.Y. 10017
ATTORNEYS FOR APPELLEE
250 WEST 57TH STREET ASSOCIATES

Theodore Richman

Sworn to before me this
1st day of April, 1977.
Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979